

No. 15024

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United States  
Court of Appeals  
for the Ninth Circuit

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GEORGE WESLEY STONE and HILDEGARDE  
STONE,

Appellants.

vs.

JACK W. S. FARNELL, and ELISABETH PAT-  
TEE FARNELL,

Appellees.

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Transcript of Record

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Appeal from the United States District Court for the  
Southern District of California  
Central Division.

**FILED**  
MAY 25 1956

PAUL P. O'BRIEN, CLERK

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Southern District of California,  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court for the Southern  
District of California, Central Division

No. 17831—BH

JACK W. S. FARNELL and ELISABETH PAT-  
TEE FARNELL,

Plaintiff,

vs.

GEORGE WESLEY STONE, HILDEGARDE  
W. STONE,

Defendants.

PETITION FOR REMOVAL OF THE ABOVE-  
ENTITLED CAUSE TO THE UNITED  
STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF CALIFORNIA,  
CENTRAL DIVISION, FROM THE SU-  
PERIOR COURT OF LOS ANGELES  
COUNTY, IN THE STATE OF CALIFOR-  
NIA

George Wesley Stone and Hildegard W. Stone,  
petitioners herein and the defendants above named,  
show:

I.

A civil action has been commenced and is now  
pending in the Superior Court of Los Angeles  
County, Burbank branch, in the State of California,  
wherein Jack W. S. Farnell and Elisabeth Pattee  
Farnell are plaintiffs and petitioners are defend-  
ants, which action is designated by general number  
Bur C 820 and is hereinafter sometimes referred to  
as "said action No. 820."

## II.

Said action No. 820 is a civil action of which the United States District Courts have original jurisdiction, in that said action is one wholly between citizens of different states and involves an amount in controversy in excess of \$3,000.00, exclusive of interest and costs. [2\*]

## III.

Petitioners seek removal of said action No. 820 to this court upon the ground and for the reason that this action involves a controversy which is wholly between citizens of different states, in that plaintiffs were, at the time of the commencement of said action and still are citizens of the State of California, residing at 13751 Mulholland Drive, Los Angeles 24, in said state of California, and that petitioners, the defendants in said action, were at the time of the commencement thereof and still are citizens of the state of New York, residing at 506 Bay 5th Street, Babylon, Long Island, in said state of New York, and not residents or citizens of the State of California.

## IV.

A copy of the complaint and summons in said action No. 820 is attached hereto, marked Exhibit "A" and made a part hereof and incorporated herein as though fully set out at length herein.

## V.

The matter in controversy in said action No. 820 at the commencement of said action and at the

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\*Page numbering appearing at foot of page of original Certified Transcript of Record.



present time exceeds the sum or value of \$3,000.00, exclusive of interest and costs.

VI.

Said action No. 820 was commenced on the 14th day of January, 1955, and an attempt to serve process therein on petitioners and defendants was made on January 19, 1955, by having a copy of the summons and complaint therein served personally on defendants at their residence; petitioners and defendants allege, however, that the service thereof was of no legal effect and subject to a motion to quash, which said motion to quash will be made by petitioners herein immediately upon the filing of this said petition for removal.

VII.

Petitioners herewith present a good and sufficient bond, as provided by statute, conditioned that petitioners will pay all costs [3] and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed.

Wherefore, petitioners pray that the said action No. 820 may be removed from said state court into this court for trial and determination; that this court accept said bond and make and enter an order of removal of said action No. 820.

Dated: January 31, 1955.

/s/ WM. JEROME POLLACK,  
Attorney for Petitioners.

Duly verified. [4]

## EXHIBIT A

In the Superior Court of the State of California  
in and for the County of Los Angeles

No. Bur. C 820

JACK W. S. FARNELL and ELISABETH  
PATTEE FARNELL,

Plaintiffs,

vs.

GEORGE WESLEY STONE and HILDEGARDE  
W. STONE,

Defendants.

Action brought in the Superior Court of the  
County of Los Angeles, and Complaint filed in the  
Office of the Clerk of the Superior Court of said  
County.

## SUMMONS

The People of the State of California Send  
Greetings to: George Wesley Stone and Hilde-  
garde W. Stone, Defendants.

You are directed to appear in an action brought  
against you by the above-named plaintiffs in the  
Superior Court of the State of California, in and  
for the County of Los Angeles, and to answer the  
Complaint therein within ten days after the service  
on you of this Summons, if served within the County  
of Los Angeles, or within thirty days if served

elsewhere, and you are notified that unless you appear and answer as above required, the plaintiffs will take judgment for any money or damages demanded in the Complaint, as arising upon contract, or will apply to the Court for any other relief demanded in the Complaint.

Given under my hand and seal of the Superior Court of the County of Los Angeles, State of California, this 14th day of January, 1955.

[Seal]                    HAROLD J. OSTLY,  
County Clerk and Clerk of the Superior Court of  
the State of California, in and for the County  
of Los Angeles,

By N. E. WOODSELL,  
Deputy.

Appearance: "A defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him." (Sec. 1014 C.C.P.)

Answers or demurrers must be in writing, in form pursuant to rule of court, accompanied with the necessary fee and filed with the clerk. [5]

[Title of Superior Court and Cause.]

COMPLAINT

(Quiet Title)

Now Come the Above-Named Plaintiffs and for Cause of Action Against the Above-Named Defendants, Allege:

I.

That the plaintiffs are the owners in fee of the residential real property situated in the County of Los Angeles, State of California, described by street and number as 13751 Mulholland Drive, Beverly Hills, California, and more particularly described as follows, to wit:

That portion of Lot 1107 of Tract 1000 as per map recorded in Book 19, Page 33 of maps, in the office of the County Recorder of said county, described as follows:

Beginning at the Southwesterly corner of the land described in the deed to Fritz Brosch, et al., recorded July 25, 1941, as Instrument No. 106, in Book 18602, Page 274, Official Records of said county, said Southeasterly corner being a point on a curve concave Southeasterly, in the Northerly line of Mulholland Highway, 200 feet wide as established by the City Engineer of said city, having a radius of 600 feet a radial line to said point bears North 32° 00' 00" West; thence [7] Northeasterly along said curve in said Northerly line through a central angle of 18° 01' 19" a distance of 188.73 feet; thence

North 12° 27' West 93.83 feet; thence South 72° 33' West 248.24 feet to the Southwesterly line of said land of Brosch, et al.; thence South 42° 51' 01" East 123.55 feet to the point of beginning.

II.

That the defendants herein claim some right, title, interest, estate or lien in or to the above-described real property adverse to plaintiffs, which said adverse claims are without right and are null and void, and said defendants have no right, title, interest, estate or lien in or to the above-described real property or any part thereof.

By Way of Further Complaint, These Plaintiffs Allege:

I.

That plaintiffs are and at all times herein mentioned were husband and wife and now reside at 13751 Mulholland Drive, Beverly Hills, California.

II.

That at all times herein mentioned defendants were and now are husband and wife, that at the time of the sale hereinafter mentioned and described, they resided at the address herein next above given but they now reside in the State of New York.

III.

That on or about the 8th day of October, 1953, the defendants offered to sell to the plaintiffs the defendants' residential real property described by

street and number as 13751 Mulholland Drive, Beverly Hills, California, situated in the County of Los Angeles and the aforesaid state and more particularly described as set out hereinabove, and in making this offer the defendants stated, represented and alleged to plaintiffs regarding said property as follows:

1. That defendants were the owners in fee of the said residential property;

2. That the improvements thereon consisted of a main residence, a three-car carport, a furnished guest house, a cesspool and septic tank, a swimming pool, walks, driveways, landscaping and other appurtenances, [8] all of which were on the land hereinabove described and were part and parcel of defendants' residential property owned by them in fee.

3. That the said residential property was well worth the price asked by defendants, namely, the sum of \$38,000.00;

4. That defendants would sell the said property to plaintiffs for the sum of \$38,000.00 on the following terms and conditions:

(1) The total purchase price of \$38,000.00;

(2) A cash down payment of \$6,500.00;

(3) An assignment of a note in the face amount of \$5,250.00 carrying interest at the rate of 7% per annum on the unpaid balance, payable full on or before April 15, 1955, and secured by a second trust deed on the former home of the plaintiffs;

(4) The assumption of the obligation to pay and discharge a note secured by a first trust deed on the subject property, the balance of which was then the sum of \$15,083.64;

(5) A note in the sum of \$11,166.36, payable at the rate of \$85.00 or more per month until March 5, 1955, and thereafter at the rate of \$100.00 or more per month, together with 6% interest on the unpaid balance made by plaintiffs, payable to defendants, and secured by a second trust deed on the subject property hereinabove described;

(6) The defendants, as Sellers, would at their cost, furnish plaintiffs, as Buyers, a policy of title insurance in a reputable title insurance company.

#### IV.

That the statements and representation numbered 1, 2 and 3 in paragraph III next hereinabove made by said defendants, as aforesaid, were each and every one of them false and fraudulent at the time they were made, and were either known by said defendants to be false or fraudulent when they made them, or, in making said statements and representations, said defendants assumed to and intended to, and did, convey to the plaintiffs the impression that they had actual knowledge of the matters so stated and represented, when said defendants were, at the time, conscious that they had no such knowledge, [9] and were then informed and knew of the facts and circumstances sufficient to

cause them to suspect the falsity thereof, which facts and circumstances were unknown to the plaintiffs and which said defendants suppressed and concealed from said plaintiffs; and that said statements and representation were made by said defendants with the intent that plaintiffs should act in reliance thereon.

#### V.

That the plaintiffs did entirely, completely and implicitly believe and rely upon each of said representations and statements so made by said defendants without the means of knowing their falsity; that plaintiffs were entitled to rely upon said representations and statements and solely and only by reason of such belief and reliance on the part of plaintiffs on each and every of said statements and representations made, plaintiffs did accept defendants offer set out in paragraph III hereinabove and did purchase such residential real property from defendants.

#### VI.

That on the 2nd day of December, 1953, a sale escrow was opened at the West Hollywood Branch of the Bank of America N. T. & S. A. for the consummation of the sale of said property by defendants and the purchase thereof by plaintiffs. That a true and exact copy of the escrow instructions and of the closing statement thereof are marked respectively Exhibit "A" and Exhibit "B," attached hereto and made a part hereof.



VII.

That through said escrow, title to the said property passed to plaintiffs on the 22nd day of December, 1953, and the said sales escrow closed on or about the 30th day of December, 1953, plaintiffs having gone into occupation of and having taken possession of said residential property on or about the 8th day of December, 1953.

VIII.

That thereafter, plaintiffs employed an architect to make plans for additions to the main residence on said property and in the course thereof employed D. P. Jones, a licensed land surveyor of the firm of Pafford, Jones & [10] White, Hollywood, California, to make a survey of the property. This survey was completed on August 11, 1954.

IX.

That the said survey disclosed and plaintiffs for the first time learned that the boundary line of the property hereinabove described and sold by defendants and purchased by plaintiffs, ran through the main residence, and north of the guest house, leaving one-third of the main residence, all of the three-car carport, all of the furnished guest house, all of the cesspool and septic tank and portions of the walks and driveways and of the landscaping and other appurtenances, entirely off plaintiffs' property and on Mulholland Drive, property belonging to the City of Los Angeles.

## X.

That defendants at the time of the sale hereinabove mentioned, knew the facts set out in paragraph IX next hereinabove, and they falsely and fraudulently represented to plaintiffs that all of said improvements were on their land and that in said sale defendants transferred good and valid title thereto to plaintiffs. That in truth and in fact, defendants did not own and in said sale did not and could not transfer to plaintiffs title to the land on which stood and was located the said improvements hereinabove mentioned to wit: The South one-third of the main residence, all of the three-car carport, all of the furnished guest house, all of the cesspool and septic tank and portions of the walks and driveways and of the landscapes and other appurtenances.

## XI.

That defendants falsely and fraudulently represented to plaintiffs that their residential property being sold by defendants to plaintiffs was well worth the purchase price of \$38,000.00; that in truth and in fact the said residential property was not worth more than \$18,000.00.

## XII.

That had plaintiffs known the falsity of defendants' representations as set out and specified hereinabove, they would not have purchased the said property. [11]

For a Further, Separate and Distinct Cause of Action, Plaintiffs Allege as Follows:

I.

Plaintiffs refer to paragraphs I to XI, inclusive, in this complaint next hereinabove set forth and by said reference incorporate and replead said paragraphs herein with the same force and effect as if repeated hereat verbatim.

II.

That had said real property been as represented by defendants it would have been worth the sum of \$38,000.00, but in truth and in fact it was reasonably worth only the sum of \$18,000.00 and no more.

III.

That as a direct and proximate result of defendants' false and fraudulent representations as aforesaid, plaintiffs were damaged in the sum of \$20,000.00.

Wherefore, Plaintiffs pray the judgment of this court decreeing that:

1. Defendants have no right, title, interest, estate or lien in or to the said real property described hereinabove;

2. That title of plaintiffs in and to said real property be quieted as against the defendants and that the second trust deed given by plaintiffs to defendants, copy of which is marked Exhibit "C" and annexed hereto and made a part hereof, and

the note secured thereby, be cancelled, vacated and declared void, or that the record thereof be cancelled and annulled;

3. That plaintiffs be awarded judgment of damages against defendants in the amount of \$20,000.00 subject to deduction for balance due on note secured by second trust deed given by plaintiffs to defendants when the same is cancelled;

4. And for costs of court incurred herein; and

5. For such other and further relief as to the court shall seem meet, just and proper in the premises.

G. V. CUTLER,

Attorney for Plaintiffs. [12]

ESCROW INSTRUCTIONS

(REAL ESTATE TRANSACTION)

This instruction when fully signed supercedes all former escrow instructions under this number.

To Bank of America NATIONAL ASSOCIATION

Escrow No. 39-2004

Escrow Officer Spencer

West Hollywood Branch West Hollywood, California

December 2, 1953

In consideration of your acting as escrow holder herein, it is agreed that you shall in no case or event be liable for forgery or false personations in connection with these instructions, instruments of record, or those handled in this escrow.

It is further agreed that if any controversy arises between the parties hereto or with any third person, you shall not be required to determine the same or take any action in the premises, but you may await the settlement of any such controversy by final appropriate legal proceedings or otherwise as you may require, notwithstanding anything in the following instructions to the contrary, and in such event you shall not be liable for interest or damage On or before January 2, 1954, to complete a total purchase price of \$38,000.00, I

I shall hand you \$6,500.00 and a \$5,250.00, second trust deed note payable in monthly instalments of \$50.00... including 7% interest, all due April 15, 1955, and also a title policy or an assignment policy or an endorsement of a title policy showing a second trust deed in Lot 10, Tract 18292, Los Angeles County Map Book 452 Pages 23,24, subject only to taxes, covenants, conditions, restrictions, reservations, rights, rights of way and easements of record and a deed of trust securing \$10,500.00 now of record, and said second trust deed assignee shall deliver to you any notes, instruments and additional funds required from me to enable you to comply with these instructions, all of which you are authorized and instructed to use and deliver provided instruments have been filed for record entitling you to procure assurance of title in the form of a Standard Joint Protection Title Insurance and Trust Company, Policy of Title Insurance issued by in its usual form, with a liability of \$ 38,000.00 covering property in the as per map recorded in Book 19, Page 33 County of Los Angeles State of California, described as follows of Maps Records of said County,

Standard Joint Protection Title Insurance and Trust Company, Policy of Title Insurance issued by in its usual form, with a liability of \$ 38,000.00

covering property in the as per map recorded in Book 19, Page 33 County of Los Angeles State of California, described as follows of Maps Records of said County,

That portion of Lot 1107 of Tract No. 1000, as per legal description attached hereto and made a part hereof and which legal description appears in Title Insurance and Trust Company Policy No. 3706162 as subject property therein.

showing title vested in Jack W. S. Farnell and Elisabeth Pattee Farnell, his wife, as joint tenants,

subject to (1) 2nd half General and Special taxes for the fiscal year 1953 54 INCLUDING ANY SPECIAL DISTRICT LEVIES, PAYMENTS FOR WHICH ARE INCLUDED THEREIN AND COLLECTED THEREWITH

(2) Assessments and Bonds, not delinquent, unpaid balance None

(3) Any covenants, conditions, restrictions, reservations, rights, rights of way and easements of record, or in deed to file

(4) Marriage - Deed of Trust securing an indebtedness of \$16,500.00 as per its terms, now of record, unpaid balance of principal 15,083.64, approximately, as to which sellers and buyers will execute the usual

Bank of America Assignment and Assumption Agreement form for delivery to lender without collection, at close of escrow. Deed to vestess shall recite said assumption, and in this connection deed dated October 8, 1953, is approved for escrow.

to be held in trust on your bank in favor of Jack W. S. Farnell and Elisabeth

Pattee Farnell, his wife, their Note for 11,166.36 in favor of George Wesley Stone and Hildgarde W. Stone,

his wife, as joint tenants, dated during escrow due (if straight note) six months after date, with interest at six percent per annum, from date payable monthly

at Los Angeles, California principal and interest due and payable in instalments of \$ 5.00 OR MORE, each on the first day of every calendar month, beginning January 5, 1954, and continuing until March 5, 1955, from and after

which date principal and interest shall be due and payable in instalments of \$100.00 or more, each on the 5th day of every calendar month, beginning April 5, 1955, and continuing until January 5, 1964, on which said date any principal and interest then unpaid shall be due and payable. This deed of trust shall recite as follows: "This deed of trust is given to secure a portion of the purchase price of subject property and is second, subject and junior to deed of trust now of record and to any extensions or renewals thereof."

In the event that beneficiary's statement as to deed of trust now of record show more or less than \$15,083.64, as a balance, then adjust the principal amount of purchase money second trust deed so that such two principal balances equal \$26,250.00.

Seller is to hand into escrow at seller's expense, for buyer's approval before close of escrow, a report from a state licensed pest control operator covering improvements at 13751 Mulholland Drive, Los Angeles, California, showing said improvements to be free of visible evidence of termites, dry rot and/or fungus infestation. Your only connection herewith is that you will not close escrow unless and until buyers approve the report handed you.

The following adjustments ONLY are required in this escrow As of close of escrow: Taxes: Interest on notes referred to in 4 and 5 above; rent per statement now filed in escrow and hereby approved for escrow.

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Seller has handed into escrow a bill of sale as to furniture, etc. in guest house to be delivered to buyer, as it is, at close of escrow without additional consideration and without responsibility as to its form, contents or efficacy nor title or existence of any personal property. Also otherwise provided make all adjustments on basis of 30-day month, based on latest available figures in case of Taxes and Assessments or Bonds, principal and interest on encumbrances of record based on statements by Mortgagees or holders of notes for collection, interest on new encumbrances by endorsement on notes, and rents on basis of statement approved by me. Assume that insurance premiums are paid and transfer on behalf of parties hereto any fire insurance policies as handed you. Forward such policies, upon close of escrow, to agent with the request that insurer consent to such transfer or attach Loss Payable or Mortgagee's Clause or other additions or corrections, and that agent thereafter forward such policies to parties entitled thereto. **Signature of either buyer on any further instructions or approvals shall bind both.**

The expression "close of escrow" if written in these instructions shall mean the date instruments are filed for record or registration. You are to cause no examination or report to be made on state, county or city taxes, either real or personal, or state corporation taxes for the year stated in paragraph (1) above prior to date first instalment payments are due and payable, and you are to order no special tax report except as herein otherwise specifically instructed.

It is understood that all disbursements shall be made to parties in interest, by your remittance and that remittance and instruments will be mailed to one of the parties entitled thereto, if more than one, to address given below. Instruct County Recorder to mail instruments in the same manner.

**AS A MEMORANDUM BETWEEN PARTIES: Sellers agree to vacate possession at close of escrow. Deliver Title Policy to beneficiary of first trust deed**

Prepare **note & trust deed** from **Jack W. S. Farnell and Elisabeth Pardee Farnell, his wife,** I will pay, on demand, regardless of the consummation of this escrow, all charges incurred by you for me, including fee for preparing instruments

I execute, fee for recording **deed and trust deed** your **buyer's** escrow fee and

**AS A MEMORANDUM BETWEEN SELLERS AND BUYERS AND ESCROW HOLDER HAS NO CONCERN WHATEVER HEREWITH: (1) Seller warrants that the guest house will be leased under a written lease for a firm term of 1 year at a rental of \$175.00 per month starting December 1, 1953 and continuing until 12-1-54; Seller warrants that said guest house may be leased without violating any law, ordinance or regulation of any competent public authority, and in the event the tenant vacates the premises at any time during the 12 month following expiration of the one year lease, buyers are permitted by sellers to pay interest only, on the second trust deed obligation for as many months as during said 12 months the guest house shall remain tenantless. If you are handed any purported leases you will forward one each to parties thereof without collection and without responsibility. (2) Seller will leave wall to wall carpeting and all draperies wherever they now are. (3) Seller warrants all furniture and furnishings to be free and clear of all encumbrances.**

Thereafter as possible a written demand for return of money or instruments by parties to this escrow received by me subsequent to such date and prior to the recording of any instrument provided for herein. **Memorandum 4: Seller agrees to return to buyers any note and trust deed executed by buyers themselves prior to maturity in exchange for a note and trust deed on said Lot 10, Tract 18292, executed by any purported buyer of said property and to request reconveyance as to first mentioned 2nd trust deed. THIS MEMORANDUM refers to notes secured by Trust Deeds As to Lot 10, Tract 18292 LA County Map Book 452, Page 23, 24.**

**Elisabeth Pardee Farnell HO26506  
1026 N. Sweetser, Los Angeles**

The foregoing instructions and conditions are hereby approved and accepted in their entirety and authorized in my name. I will supply you with funds, notes and instruments required from me to enable you to comply with the instructions, which you are authorized to use and deliver provided you hold for my account any instruments accruing to me and the sum of \$ **6,500.00,**

Order search of title at once Deduct all my expenses from funds accruing to me I will pay, on demand, regardless of the consummation of this escrow, all charges incurred by you for me (except those other party has agreed to pay) including title charge, fee for preparing instruments I execute.

your **seller** escrow fee and  
Prepare **(deed is prepared)** from  
Attach Internal Revenue Stamps in the amount of \$ \_\_\_\_\_ to Deed I execute  
Pay Commission of \$ \_\_\_\_\_ to  
License No \_\_\_\_\_

Makes following disposition of proceeds due me  
1. Credit Com'l account of \_\_\_\_\_ at your \_\_\_\_\_ Branch  
2. Mail Check to me at **20-43-207th St., Queens Village 28, Long Island, New York.**

**Signature on any further instructions or approvals by either seller shall bind both. Obtain beneficiary's statement from your Clauson and Avalon Branch for use in escrow. If title company cannot find first half taxes paid, hold sum sufficient to cover such 1st. half taxes until title company reports the payment.**

Signature **Hildegard W. Stone** Signature **George Wesley Stone, Address above**  
Address \_\_\_\_\_ or **13751 Mulholland Drive, Los Angeles,**  
Telephone \_\_\_\_\_ Address **Cal ST 45929**  
Telephone \_\_\_\_\_

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**This Deed of Trust**, made this **3rd** day of **December**, 19 **53**

**Between Jack W. S. Farnell and Elisabeth Patten Farnell, his wife**

of **13751 Mulholland Drive** in the City of **Los Angeles**  
(Street and Number)

County of **Los Angeles**, State of **California**

herein called TRUSTOR, **Bank of America**, a national banking association, herein called TRUSTEE, and

**George Wesley Stone and Hildegarda W. Stone, his wife, as joint tenants** herein called BENEFICIARY,

**Witnesseth:** That Trustor irrevocably GRANTS, TRANSFERS AND ASSIGNS to TRUSTEE IN TRUST, WITH POWER OF SALE, that property in **Los Angeles** County, California, described as:

**That portion of Lot 1107 of Tract No. 1000, as per map recorded in Book 19, Page 33 of Maps, in the office of the County Recorder of said county, described as follows:**

**Beginning at the Southwesterly corner of the land described in the deed to Frits Broech et al, recorded July 25, 1941, as Instrument No. 106, in Book 18602, Page 274, Official Records of said county, said Southeasterly corner being a point on a curve concave Southeasterly, in the Northerly line of Mulholland Highway, 200 feet wide, as established by the city engineer of said city, having a radius of 600 feet, a radial line to said point bears North 32° 00' 00" West; thence Northeasterly along said curve in said Northerly line through a central angle of 18° 01' 19" a distance of 188.73 feet; thence North 12° 27' West 93.83 feet; thence South 72° 33' West 248.24 feet to the Southwesterly line of said land of Broech et al; thence South 42° 51' 01" East 123.55 feet to the point of beginning.**

**This deed of trust is given to secure a portion of the purchase price of subject property and is second, subject and junior to a deed of trust now of record and to any extensions or renewals thereof.**

TOGETHER WITH the rents, issues and profits thereof, SUBJECT, HOWEVER, to the right, power and authority given to and conferred upon Beneficiary by Section B, Paragraph 5, of the provisions adopted and included herein by reference to collect and apply such rents, issues and profits.

**For the purpose of Securing** (1) payment of the indebtedness evidenced by one promissory note of even date herewith in the principal sum of **\$ 11,166.36** payable to Beneficiary or order, and (2) the performance of each agreement of Trustor adopted and included by reference or contained herein.

**By the execution and delivery of this Deed of Trust** and the note secured hereby the parties hereto agree that there are adopted and included herein for any and all purposes by reference as though the same were written in full herein the provisions of Section A, including paragraphs 1 through 5 thereof, and of Section B, including paragraphs 1 through 9 thereof, of that certain fictitious Deed of Trust recorded in the official records in the office of the County Recorder of Sacramento County on April 18, 1950, in book 1814 at page 186 and so the official records in the office of the County Recorder of Shasta County on April 17, 1950, in the books and at the pages designated after the name of each county:

COUNTY	BOOK	PAGE	COUNTY	BOOK	PAGE	COUNTY	BOOK	PAGE	COUNTY	BOOK	PAGE
Alameda	6080	519	Kern	1634	347	Nevada	149	199	Santa Cruz	767	498
Alpine	F	71	Kings	454	10	Orange	1999	492	Sierra	1	202
Amador	42	76	Lake	206	449	Placer	566	647	Siskiyou	257	334
Butte	544	145	Lassen	60	146	Plumas	31	94	Solano	527	21
Calaveras	60	309	Los Angeles	32874	311	Reverade	1164	316	Sonoma	953	386
Colusa	166	2	Madera	491	62	San Benito	169	406	Stanislaus	1000	1
Contra Costa	1539	32	Marin	647	154	San Bernardino	2562	143	Sutter	321	30
Del Norte	31	475	Mariposa	31	306	San Diego	3584	100	Tehama	210	308
El Dorado	275	485	Mendocino	267	53	San Francisco	5423	490	Trinity	400	420
Fresno	2815	75	Merced	981	44	San Joaquin	1240	432	Tulare	1437	411
Gleann	244	415	Modoc	82	341	San Luis Obispo	560	594	Tuolumne	926	397
Humboldt	127	442	Mono	27	83	San Mateo	1818	193	Ventura	321	95
Imperial	777	126	Monterey	1210	132	Santa Barbara	911	491	Yalo	140	213
Inyo	83	3	Napa	331	100	Santa Clara	1962	33			

A copy of said provisions so adopted and included herein by reference is set forth on the reverse hereof. The undersigned Trustor requests that a copy of any notice of default and of any notice of sale hereunder be mailed to him at his address given above.

Signature of Trustor

**Jack W. S. Farnell**

**Elisabeth Patten Farnell**

STATE OF CALIFORNIA }  
 COUNTY OF **Los Angeles** }

SPACE BELOW FOR RECORDER'S USE ONLY  
 Inland as True Deed and Assignment of Rents

On this **14** day of **December**, 19 **53**  
 before me, **the undersigned** **Jack W. S.**  
 Public in and for said County, personally appeared **Farnell and Elisabeth Patten Farnell**

**EX HIBIT "C"**

known to me to be the person(s) whose name(s) **are** subscribed  
 to the within instrument, and acknowledged that **they** executed  
 the same.

WITNESS my hand and official seal  
 (SEAL) **R. P. Spencer (s)**  
**R. P. Spencer**  
 Notary Public in and for said County and State

My Commission Expires **December 7, 1956.**  
 (If executed by a corporation the corporation form of acknowledgment must be used.)



G. V. CUTLER

Attorney for Plaintiff

133 North Third St.

Burbank, California

Address

Telephone: TH 64911 TH 65077

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF LOS ANGELES

JACK W. S. FARNELL ET UX

Plaintiff,

vs. STONE  
GEORGE WESLEY ~~STONE~~ ET UX

Defendant.

No. BUR C

CERTIFICATE FOR  
ASSIGNMENT AND TRANSFER

This is to certify that the above entitled action is entitled to be transferred to the

Burbank A

Department of the Superior Court of Los Angeles County,

as provided in Subdivision M, Rule 18 of this Court, for the following reason:

Convenience of parties and witnesses.

SO ORDERED:

G. V. Cutler

Attorney for Plaintiffs

STATE OF CALIFORNIA, }  
County of Los Angeles, } ss.  
Jack W. S. Farnell

Judge

, being first duly sworn, on oath, says:

That he is the \_\_\_\_\_ plaintiff in the above entitled action;  
that he has read the foregoing certificate and knows the contents thereof; and that the same  
is true of his own knowledge.

Subscribed and sworn to before me this

Jack W. S. Farnell

14 day of January, 1955.

G. V. Cutler *Mary E. Fisher*  
Notary Public (SEAL)

Endorsed : Filed February 2, 1955.

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In the United States District Court for the  
Southern District of California, Central Division  
No. 17831-BH

JACK W. S. FARNELL, et al.,

Plaintiffs,

vs.

GEORGE WESLEY STONE, et al.,

Defendants.

AFFIDAVIT OF GIVING NOTICE, FILING  
COPY OF PETITION FOR REMOVAL

State of California,  
County of Los Angeles—ss.

Wm. Jerome Pollack, being first duly sworn according to law deposes and says as follows: That subsequent to the filing of the Petition for Removal and the bond herein, affiant gave written notice of the filing of said bond and petition to all adverse parties and filed a copy of the said petition with the Clerk of the Superior Court of Los Angeles County, in duplicate.

/s/ WM. JEROME POLLACK.

Subscribed and sworn to before me this 3rd day of February, 1955.

[Seal] /s/ SYDELL WOLFE,

Notary Public in and for  
Said County and State.

[Endorsed]: Filed February 3, 1955. [19]

[Title of District Court and Cause.]

NOTICE OF REMOVAL

To Plaintiffs, Jack W. S. Farnell and Elisabeth Pattee Farnell and to G. V. Cutler, Their Attorney:

You and Each of You Will Please Take Notice That Defendants have filed a petition for removal to the above-entitled United States District Court of the above-entitled action, pursuant to Title 28, Sections 1441-1450, inclusive, of United States Code and have filed a bond as required by Section 1446(a) of said Title and

You Are Hereby Given Notice of the filing of said petition on February 2, 1955, and bond and a copy of said petition is attached herewith.

Dated: February 2, 1955.

/s/ WM. JEROME POLLACK,  
Attorney for Defendants.

Affidavit of service by mail attached.

[Endorsed]: Filed February 3, 1955. [20]



In the United States District Court for the  
Southern District of California, Central Division  
No. 17831-BH

JACK W. S. FARNELL, ELISABETH PATTEE  
FARNELL,

Plaintiffs,

vs.

GEORGE WESLEY STONE, HILDEGARDE  
W. STONE,

Defendants,

BANK OF AMERICA, a Corporation,

Additional Defendant on Counterclaim.

### ANSWER AND COUNTERCLAIM

Come now the defendants George Wesley Stone and Hildegarde W. Stone and in answer to plaintiffs' complaint on file herein admit, deny and allege as follows:

#### Answer to First Cause of Action

##### I.

In answer to Paragraph II, defendants deny that their said claim or claims, adverse or otherwise, is or are without right or null or void; defendants deny that they have no right or title or interest or estate or lien in or to the real property described in said complaint. Defendants allege that they are the beneficiaries of a trust deed which is a valid

and subsisting lien on said real property, which said trust deed covers the real property described in Paragraph I of plaintiffs' first cause of action, is dated December [32] 3, 1953, executed by Jack W. S. Farnell and Elisabeth Pattee Farnell, trustors, in favor of George Wesley Stone and Hildegarde W. Stone as beneficiaries, with the Bank of America as trustee; said trust deed was recorded on December 22, 1953, in Book 13450, page 271, of Official Records of Los Angeles County, California.

### Answer to Second Cause of Action

#### I.

Defendants deny generally and specifically each and every, all and singular, the allegations contained in Paragraph IV.

#### II.

In answer to Paragraph V, defendants admit that plaintiffs accepted said offer and purchased said real property from defendants. Except as expressly admitted, defendants deny generally and specifically each and every, all and singular, the allegations contained in said Paragraph V.

#### III.

In answer to Paragraph X, defendants deny that at the time of sale or at any time prior thereto or at any other time they knew the facts set out in Paragraph IX; defendants deny that they falsely or fraudulently represented to plaintiffs, or either of them, that all of said improvements were on their

land; defendants deny that they falsely or fraudulently represented to plaintiffs, or either of them, that in said sale they transferred good or valid title thereto to plaintiffs, or either of them.

IV.

Deny generally and specifically each and every, all and singular, the allegations contained in Paragraph XI.

V.

Deny generally and specifically each and every, all and singular, the allegations contained in Paragraph XII.

Answer to Third Cause of Action

I.

In answer to Paragraph I, defendants refer to Paragraphs I, II, III, IV and V of their answer to second cause of action, incorporate them herein and make them a part hereof as though fully set out at length herein.

II.

Deny generally and specifically each and every, all and singular, the allegations contained in Paragraph II.

III.

Deny generally and specifically each and every, all and singular, the allegations contained in Paragraph III.

## For a Counterclaim, Defendants Allege:

## I.

Plaintiffs Jack W. S. Farnell and Elisabeth Pattee Farnell are husband and wife.

## II.

That defendant Bank of America, a corporation, is a corporation organized and existing under and by virtue of the laws of the State of California; that said defendant is trustee named in the trust deed hereafter referred to and is made an additional party hereto on the counterclaim for the purpose of having all parties interested before the Court.

## III.

On December 3, 1953, plaintiffs Jack W. S. Farnell and Elisabeth Pattee Farnell made, executed and delivered to defendants George Wesley Stone and Hildegard W. Stone their certain promissory note in writing in the sum of \$11,166.36, payable with six per cent interest per annum at the rate of \$85.00 per month, commencing January 5, 1954, until March 5, 1955, after which said monthly payments were to be in the sum of \$100.00 per month. A photostatic copy of said note is attached hereto, marked Exhibit "A" and made a part hereof. [34]

## V.

As security for said promissory note, and as part of the same transaction, plaintiffs Jack W. S. Farnell and Elisabeth Pattee Farnell executed and delivered to defendants George Wesley Stone and

Hildegarde W. Stone a trust deed upon the following described real property situated in Los Angeles County, California:

That portion of Lot 1107 of Tract No. 1000, as per map recorded in Book 19, Page 33 of Maps, in the office of the County Recorder of said County, described as follows: Beginning at the Southwesterly corner of the land described in the deed to Fritz Brosch, et al., recorded July 25, 1941, as Instrument No. 106, in Book 18602, Page 274, Official Records of said County, said Southeasterly corner being a point on a curve concave Southeasterly, in the Northerly line of Mulholland Highway, 200 feet wide, as established by the city engineer of said city, having a radius of 600 feet, a radio line to said point bears North  $32^{\circ} 00' 00''$  West; thence Northeasterly along said curve in said Northerly line through a central angle of  $18^{\circ} 01' 19''$  a distance of 188.73 feet; thence North  $12^{\circ} 27'$  West 93.83 feet; thence South  $72^{\circ} 33'$  West 248.24 feet to the Southwesterly line of said land of Brosch, et al.; thence South  $42^{\circ} 51' 01''$  East 123.55 feet to the point of beginning.

Said trust deed was duly recorded on December 22, 1953, in book 13450, page 271 of Official Records in the office of the County Recorder of said Los Angeles County. A copy of said trust deed is attached hereto, marked Exhibit "B" and made a part hereof.

## V.

The trust deed sued on herein is being foreclosed as a mortgage. [35]

## VI.

Defendants George Wesley Stone and Hildegarde W. Stone are the legal holders and owners of said note and trust deed.

## VII.

Default has been made under the terms of said note and trust deed in that the aggregate of the monthly payments of principal and interest which had matured and become due under the terms thereof as of February 5, 1955, is \$1190.00, no part of which has been paid except \$595.00. Defendants George Wesley Stone and Hildegarde W. Stone have exercised their option by reason of said default and have declared the entire remaining balance of said note to be due, together with interest on said sum from August 5, 1954, at the rate of six per cent per annum.

## VIII.

By the terms of said note and trust deed plaintiffs agreed to pay attorney's fees in a reasonable amount to be fixed by the Court and all costs and expenses in any action brought to foreclose this trust deed or in any action on said note. Defendants George Wesley Stone and Hildegarde W. Stone have employed an attorney, Wm. Jerome Pollack, to institute an action on said note and foreclose said trust deed and there is now due to said attorney for and on account of attorney's fees, a reasonable attorney's fee in such amount as may be fixed by the Court.

Wherefore, defendants George Wesley Stone and Hildegard Stone pray that:

1. Plaintiffs take nothing by their complaint on file herein;

2. The Court orders Bank of America, a corporation, to be made a party defendant to respond to the counterclaim herein;

3. Defendants George Wesley Stone and Hildegard W. Stone have judgment on their counterclaim against plaintiffs and Bank of America as follows: [36]

a. Defendants George Wesley Stone and Hildegard W. Stone recover from plaintiffs the sum of \$10,959.09 principal, together with interest thereon at the rate of six per cent per annum from August 5, 1954, plus reasonable attorney's fees as fixed by the Court, plus costs and disbursements herein and the charges and costs of sale;

b. Plaintiffs and all persons claiming under them be foreclosed of any equity of redemption of said real property or any part thereof;

c. Said real property be adjudged to be sold en masse in the manner provided by law and the practice of this Court, by the sheriff of Los Angeles County or by the commissioner appointed for that purpose, and the proceeds applied to the payment of the amount due on said note and trust deed, with interest, disbursements, costs, attorney's fees;

d. Defendants George Wesley Stone and Hildegard W. Stone may be the purchaser at said sale,



and that the sheriff or commissioner execute a certificate of sale, and upon the expiration of the period of redemption that the holder of said certificate of sale be let into possession of said premises, and that the sheriff or commissioner issue a deed to said purchaser;

e. If the proceeds of such sale be insufficient to pay the amount so due to said defendants George Wesley Stone and Hildegard W. Stone, as aforesaid, and it shall so appear from the return of sale, judgment for such deficiency be thereupon entered against plaintiffs;

4. For costs of suit incurred herein;

5. For such other and further relief as to the Court may seem proper.

/s/ WM. JEROME POLLACK,  
Attorney for Defendants. [37]

#### EXHIBIT A

Deed of Trust Instalment Note—Interest Included

Do not destroy this note: When paid, this note, with Deed of Trust securing same, must be surrendered to Trustee for cancellation and retention, before reconveyance will be made.

\$11,166.36. Los Angeles, Calif., Dec. 3, 1953

In instalments as herein stated, for value received, I promise to pay to George Wesley Stone and Hildegard W. Stone, his wife, as joint tenants,



or order, at Los Angeles, California the sum of Eleven Thousand, One Hundred, Sixty-Six and 36/100 Dollars, with interest from date on unpaid principal at the rate of six per cent per annum; principal and interest payable in instalments of Eighty-five and no/100 Dollars or more on the 5th day of each calendar month, beginning on the 5th day of January, 1954, and continuing until March 5, 1955, from and after which date principal and interest shall be due and payable in installments of \$100.00, or more, each on the 5th day of every calendar month beginning April 5, 1955, and continuing until January 5, 1964, on which said date any principal and interest then unpaid shall be due and payable. Each payment shall be credited first on interest then due and the remainder on principal; and interest shall thereupon cease upon the principal so credited. Should default be made in payment of any instalment when due the whole sum of principal and interest shall become immediately due at the option of the holder of this note. Principal and interest payable in lawful money of the United States. If action be instituted on this note I promise to pay such sum as the Court may fix as attorney fees. This note is secured by a Deed of Trust of even date herewith to Bank of America National Trust and Savings Association, a National Banking Association.

/s/ JACK W. S. FARNELL,

/s/ ELISABETH PATTEE  
FARNELL. [38]



adopting and including by reference certain provisions of a deed of trust recorded in the counties named herein.

A copy of said provisions is set forth on the reverse hereof.

This Deed of Trust, made this 3rd day of December 1953

Between Jack W. S. Farnell and Elisabeth Pattee Farnell, his wife,

at 13751 Mulholland Drive in the City of Los Angeles

County of Los Angeles, State of California

herein called TRUSTOR, Bank of America a national banking association, herein called TRUSTEE, and

George Wesley Stone and Hildegard W. Stone, his wife, as joint tenants

herein called BENEFICIARY, Witnesseth: That Trustor irrevocably GRANTS, TRANSFERS AND ASSIGNS TO TRUSTEE IN TRUST WITH POWER OF SALE, that property in the County of California described as:

portion of Lot 1207 of Tract No. 1000, as per map recorded in Book 19, Page 33 maps, in the office of the County Recorder of said County, as stated as follows:

beginning at the Southwesterly corner of the land described in the deed to Fritz Schuch et al, recorded July 25, 1941, as Instrument No. 106, in Book 18602, Page 274, Official Records of said County, said Southeasterly corner being a point on a curve curve Southeasterly, in the Northerly line of Mulholland Highway, 200 feet wide, established by the city engineer of said city, having a radius of 600 feet, a radial line to said point bears North 32° 00' 00" West; thence Northeasterly along a curve in said Northerly line through a central angle of 13° 01' 19" a distance 80.73 feet; thence North 12° 27' west 93.83 feet; thence South 72° 33' West 245.24 feet to the Southwesterly line of said land of Brosch et al; thence South 42° 51' 01" West 123.55 feet to the point of beginning.

A deed of trust is given to secure a portion of the purchase price of subject property as second subject and junior to a deed of trust now of record and to any extensions thereof.

TRUSTEE HERewith the rents, issues and profits thereon SUBJECT, HOWEVER, to the right power and authority given to and conferred upon Beneficiary by Section B, Paragraph 1 of the provisions adopted and included herein by reference to collect and apply such rents, issues and profits.

For the purpose of securing the payment of the indebtedness evidenced by any promissory note of even date here with, the principal sum of \$11,166.36 payable to Beneficiary in order and (2) the performance of each agreement of Trustor adopted and included by reference contained herein.

By the execution and delivery of this Deed of Trust and the instruments which the parties hereto agree that they shall execute, the parties hereto agree that the provisions of Section A, including Paragraphs 1 through 9 thereof, and Section B, including Paragraphs 1 through 9 thereof of this certain Deed of Trust recorded in the Official Records in the office of the County Recorder of Santa Clara County on April 18, 1940, in Book 18, 4 at page 12, and in the Official Records in the office of the County Recorder of the following counties on April 17, 1940, in the books and at the pages designated after the name of each county:

COUNTY	BOOK	PAGE	COUNTY	BOOK	PAGE	COUNTY	BOOK	PAGE
Alameda	6080	319	Kern	1634	147	Nevada	149	199
Alpine	1	71	Kings	454	10	Orange	1999	492
Amador	42	78	Lake	206	449	Placer	566	647
Butte	544	145	Lassen	60	146	Plumas	31	94
Calaveras	60	309	Los Angeles	12874	111	Riverside	1164	136
Colusa	166	2	Madera	491	82	San Benito	169	406
Contra Costa	1519	32	Marin	647	154	San Bernardino	2562	141
Del Norte	11	475	Mariposa	31	196	San Diego	3584	100
El Dorado	275	485	Mendocino	267	51	San Francisco	5425	490
Fresno	2815	75	Merced	981	44	San Joaquin	1240	432
Glenn	244	415	Modoc	82	141	San Luis Obispo	960	994
Humboldt	127	442	Monterey	27	81	San Mateo	1818	191
Imperial	777	126	Morro Bay	1210	132	Santa Barbara	911	491
Inyo	81	1	Napa	151	100	Santa Clara	1962	14

A copy of said provisions is adopted and included herein by reference is set forth on the reverse hereof. The undersigned Trustor requests that a copy of any notice of default and of any notice of sale hereunder be mailed to him at his address given above.

Signature of Trustor

Handwritten signatures of Jack W. S. Farnell and Elisabeth Pattee Farnell.

STATE OF CALIFORNIA COUNTY OF Los Angeles

SPACE BELOW FOR RECORDER'S USE ONLY Includ as Trust Deed and Assignment of Rents

On this 14 day of December 1953 before me, the undersigned, a Notary Public in and for said County, personally appeared Jack W. S. Farnell and Elisabeth Pattee Farnell

DOCUMENT No. 540 RECORDED AT REQUEST OF TITLE INSURANCE & TRUST CO.

DEC 22 1953 AT 8 A. M. BOOK 13450 PAGE 271 IN OFFICIAL RECORDS County of Los Angeles, California

Witness to be the person(s) whose name(s) are subscribed to this instrument, and acknowledged that they executed the same. WITNESS my hand and official seal this December 7, 1956 Notary Public in and for said County and State

Fee \$ 3.31 MAME B. BEATY, County Recorder By a. ed. Deputy

My Commission Expires December 7, 1956 (to be used by a corporation the corporation form of acknowledgment must be used)

Endorsed: Filed February 23, 1955.

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Exhibit B

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[Title of District Court and Cause.]

## ANSWER TO COUNTERCLAIM

Come now the plaintiffs herein, and answering the Counterclaim on file herein admit, allege, and deny as follows:

### I.

Answering Paragraphs V and VI of defendants' Counterclaim, these answering plaintiffs state that they have no information or belief on the matters and things therein mentioned and alleged sufficient to enable them to answer the same, and on that ground deny generally and specifically each and every allegation in said paragraphs contained and the whole thereof.

### II.

Answering paragraphs VII and VIII of the Counterclaim, these [50] answering plaintiffs admit that they have not continued payment on the said note and in justification of their action in discontinuing the payments on said note from and after the 5th day of February, 1955, as in said Counterclaim alleged, plaintiffs refer to their Second Cause of Action set out in the Complaint, beginning with Paragraph I thereof on page 2 of the Complaint, to and including Paragraph XII thereof on page 5, and by this reference incorporates herein said paragraphs and their allegations with the same force and effect as if set out hereat verbatim.

Wherefore, these answering plaintiffs pray that the said note and the Trust Deed set out in and at-

tempted to be foreclosed as a mortgage by and in the Counterclaim, be declared by this Court to be cancelled and to be null and void on the grounds that they were procured by the fraud of the plaintiffs and on the ground of substantial failure of consideration from defendants to plaintiffs and plaintiffs pray that defendants take nothing thereby, and that plaintiffs have and be awarded by this Court the relief prayed for in the Complaint on file herein.

/s/ G. V. CUTLER,

Attorney for Plaintiffs.

Duly verified.

Affidavit of service by mail attached.

[Endorsed]: Filed August 4, 1955. [51]

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[Title of District Court and Cause.]

MINUTES OF THE COURT  
AUGUST 9, 1955

Present: Hon. Ben Harrison, District Judge.

Proceedings:

For jury trial. At 10:12 a.m. Court convenes herein. Both sides answer ready and It Is Ordered that trial proceed.

Counsel for plaintiffs offers certain documents in evidence, and on stipulation of counsel for defendants, same are ordered admitted in evidence, and same are marked Plfs' Ex. 1.



Anton H. Deutsch is called by plaintiffs, sworn, and testifies, and Plfs' Ex. 2 is admitted into evidence and marked.

Don P. Jones is called by plaintiffs, sworn, and testifies, and Plfs' Ex. 3 is admitted into evidence and marked.

Counsel for defendants and counsel for plaintiffs orally stipulate that this cause may proceed as a non-jury case, and that a jury is waived at this time.

Said witness Don P. Jones testifies further.

P. D. Baehr is called by plaintiffs, sworn, and testifies, and Plfs' Ex. 4 is admitted into evidence on stipulation of counsel for defendants.

Harry Bernasconi is called by plaintiffs, sworn, and testifies.

At 11:15 a.m. Court recesses to 11:21 a.m., when Court reconvenes herein, appearances being as before.

Anton H. Deutsch, heretofore sworn, is recalled and testifies further.

Bruce D. Wilfong, Frank Queen Peters, and Jack W. S. Farnell, one of the plaintiffs, are, respectively, called, sworn, and testify for plaintiffs.

At 11:53 a.m. Court recesses until 2 p.m. today.

At 2:15 p.m. Court reconvenes herein, and all being present as before, Court orders trial proceed.

Jack W. S. Farnell, one of the plaintiffs, heretofore sworn, resumes the stand and testifies further.

Elisabeth Pattee Farnell, one of the plaintiffs, is called, sworn, and testifies. Plaintiffs rest:

Attorney Pollack on behalf of defendants Stone moves that the complaint of plaintiffs be dismissed and for judgment in favor of Defendants Stone, and states the grounds of the motion to the Court.

The Court Orders said motion on behalf of Defendants Stone denied.

George Wesley Stone, one of the defendants, is called, sworn, and testifies. At 2:40 p.m. Court recesses to 2:45 p.m., at which time Court reconvenes herein, and all being present as before, Court Orders trial proceed.

Hildegarde W. Stone, one of the defendants, is called, sworn, and testifies. Plfs' Ex. 5 is admitted in evidence and marked.

Jack W. S. Farnell, defendant, heretofore sworn, is recalled by defendants Stone under Rule 43(b) and testifies further.

Counsel for the parties hereto have a discussion relative to a certain plat, and that if said plat is found and produced, counsel may stipulate to the same being admitted into evidence herein.

The Court makes a statement to counsel that they will be given time to brief the questions of law.

The Court makes a further statement to counsel and to the parties hereto.

It Is Ordered that upon the filing of briefs of counsel 20x20x20, this cause is to stand Submitted for decision.

On motion of counsel for Defendants Stone It Is Ordered that the Bank of America, a corporation, be, and it is Dismissed as an additional defendant on the counterclaim of Defendants Stone.

The Court and counsel have a further discussion.  
At 3:25 p.m. Court adjourns.

JOHN A. CHILDRESS,  
Clerk;

By /s/ MURRAY E. VIRE,  
Deputy Clerk.

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[Title of District Court and Cause.]

MINUTES OF THE COURT  
NOVEMBER 3, 1955

Present: Hon. Ben Harrison, District Judge.

Proceedings:

This cause having been heretofore tried and submitted for decision, and the Court having duly considered the pleadings, record, evidence, briefs of counsel, and the law applicable, and being fully advised in the premises, now signs and orders filed its Memorandum Opinion, and in accordance therewith, finds and orders as follows:

From the facts presented there is definite damage to plaintiffs which the Court finds from all the evidence to be in the amount of \$15,000.

It Is Hereby Ordered that the second trust deed given by plaintiffs to defendants and the note secured thereby be cancelled and that the judgment of \$15,000 be subject to this deduction.

Judgment is also rendered against defendants on

their counterclaim for default of the second trust deed note and foreclosure of the subject property.

Counsel for plaintiffs is directed to submit proposed judgment and findings to the Court within ten days from date.

Filed Memorandum Opinion.

Mailed copies of Memorandum Opinion to respective counsel.

JOHN A. CHILDRESS,  
Clerk.

By /s/ MURRAY E. VIRE,  
Deputy Clerk.

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[Title of District Court and Cause.]

### MEMORANDUM OPINION

This is an action based on fraud to recover damages for misrepresentations with regard to a residence on 13751 Mulholland Drive, Beverly Hills, California, purchased by plaintiffs from defendants. The plaintiffs paid \$38,000 for property that was to include a main house, three car ports, a guest house, and appurtenant real property. After taking possession plaintiffs discovered through a survey of the property that the boundary of their real property did not include one-third of the main house, all the car ports, all of the guest house, and a proportionate amount of the real property.

After due consideration the Court is of the opinion that the plaintiffs have established their right to damages. Although conflicting evidence was introduced on whether there were express representations as to the boundaries [53] of the property, it is my view that representations, express as well as implied, were made entitling the plaintiffs to recovery.

The California Civil Code defines fraud as being either actual or constructive. [California Civil Code § 1571.]

Actual fraud [California Civil Code § 1572] is defined to consist among other things, of the following act(s) committed by a party to a contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter the contract:

“(2) The positive assertion in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true.”

Constructive fraud [California Civil Code § 1573] consists:

“(1) In any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him.”

The law in California is well settled that a vendor is presumed to know the area and boundaries

of his own land. [See *Harder v. Lang Realty Co.*, 214 P. 1017 (1923); *Del Grande v. Castelhun*, 205 P. 18 (1922); *Eichelberger v. Mills Land, etc., Co.*, 100 P. 117 (1908); *Shearer v. Cooper*, 134 P. 2d 764 (1943); *Hargrove v. Henderson*, 292 P. 148 (1930).] A purchaser is entitled to rely on the vendor's representations as to the boundaries and not make an independent investigation. [*Teague v. Hall*, 154 P. 851 (1916); *Peardon v. Markley*, 195 P. 70 (1920); *Eichelberger v. Mills Land, etc., Co.*, 100 P. 117 (1908).] And even though plaintiffs were supposed to have received a map showing the proper boundaries [54] of the property, it does not seem from all the evidence that they were put on notice.

Thus here it is clear that defendants have committed constructive fraud [California Civil Code §1573] breaching their duty to know the area of their land and gaining advantage of the plaintiffs. The defendants have also committed actual fraud under California Civil Code §1572 subd. 2 in that they made representations not warranted by their information. In *Shearer v. Cooper*, *supra*, at 768, the Supreme Court of California in affirming the trial court declared:

“It is fair to assume that the defendant did not know the exact location of the boundaries of the acreage which he sold to the plaintiffs; but under the law it is a matter about which he should have informed himself before making the representations. The trial court con-

cluded that the defendant's positive assertions in a manner not warranted by the information he possessed, of that which was not true, constituted actual fraud within the meaning of Subdivision 2 of §1572 of the Civil Code."

[See also *Sturnis v. Adams*, 195 P. 955 (1920); *Harris v. Miller*, 235 P. 981 (1925); *Hargrove v. Henderson*, 292 P. 148 (1930).]

The defendants concede in their brief that by their acts they have committed constructive fraud, but that this only permits a suit for rescission. The argument presented is that where there are only innocent misrepresentations an action for damages will not lie. Inherent in this argument is the admission that ordinarily where there are material misrepresentations one has two remedies, either a suit for rescission or an action for damages, but where misrepresentations are innocent there is only the single remedy of rescission. [55]

In the law of California there does not appear to be that distinction. Especially so since there can be actual fraud without the positive intent to deceive. The defendants' argument is based largely on the fact that many cases discussing fraud, either actual or constructive, are suits for rescission. The fact that a party decides to rescind a contract rather than affirm it, however, does not necessarily change the applicable law. The reason that there may be so many suits for rescission under these circumstances may perhaps be just attributed to the fact that a



party would not have acted had he known the real conditions of his purchase.

In this case there does not appear to be any problem with what is known as an election of remedies. [See 26 So. Col. L. Rev. 157 (1952), Election of Remedies for Fraudulent Misrepresentations.] The plaintiffs have always acted consistently with their decision to affirm the contract. There can be little doubt that plaintiffs can sue for damages. This same question was thoroughly discussed in *Hargrove v. Henderson*, *supra*, at 151 et seq., where it was decided affirmatively. And in *Shearer v. Cooper*, *supra*, decided by the California Supreme Court, an action for damages was permitted on facts similar to those here. [See also *Herzog v. Capital Co.*, 150 P. 2d 218 (1944), affirmed in 164 P. 2d 8 (1945); *Kaluzok v. Brisson*, 167 P. 2d 481 (1946); *Nevada Land & Investment Corp. v. Sistrunk*, 30 P. 2d 389 (1934); *Kent v. Clark*, 128 P. 2d 868 (1942).]

From the facts presented there is definite damage to plaintiffs which the Court finds from all the evidence to be in the amount of \$15,000. It is hereby ordered that the second trust deed given by plaintiffs to defendants and [56] the note secured thereby be cancelled and that the judgment of \$15,000 be subject to this deduction. Judgment is also rendered against defendants on their counterclaim for default of the second trust deed note and foreclosure of the subject property.

Counsel for plaintiffs is directed to submit pro-



posed judgment and findings to me within ten days from date hereof.

Dated: This 3rd day of November, 1955.

/s/ BEN HARRISON,  
Judge.

[Endorsed]: Filed November 3, 1955. [57]

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In the United States District Court for the  
Southern District of California, Central Division  
No. 17831-BH

JACK W. S. FARNELL, et al.,

Plaintiffs,

vs.

GEORGE WESLEY STONE, et al.,

Defendants.

### JUDGMENT

The above-entitled action came on regularly for trial on the 9th day of August, 1955, before the Honorable Ben Harrison, Judge, sitting without a jury, G. V. Cutler, Esquire, appearing as attorney for plaintiffs and William Jerome Pollack, Esquire, appearing as attorney for defendants, and the Court having heard the evidence and the arguments of counsel and having considered the briefs of counsel filed herein and having fully considered the same, and having made its Findings of Fact and drawn its Conclusions of Law;

Now, Therefore, It Is Ordered, Adjudged and Decreed:

That plaintiffs have and recover of and from defendants the sum of \$15,000.00 as damages:

That defendants recover nothing by reason of their counterclaim;

That the second Trust Deed given by plaintiffs to defendants dated December 3, 1953, of the real property described in the complaint and the note secured thereby are cancelled; said real property being in Los Angeles County, [58] State of California, and described as:

That portion of Lot 1107 of Tract 1000 as per map recorded in Book 19, page 33 of Maps, in the office of the County Recorder of said County, described as follows:

Beginning at the Southwesterly corner of the land described in the deed to Fritz Brosch, et al., recorded July 25, 1941, as Instrument No. 106, in Book 18602, page 274 Official Records of said County, said Southeasterly corner being a point on a curve concave Southeasterly, in the Northerly line of Mulholland Highway, 200 feet wide as established by the City Engineer of said City, having a radius of 600 feet a radial line to said point bears North 32° 00' 00" West; thence Northeasterly along said curve in said Northerly line through a central angle of 18° 01' 19" a distance of 188.73 feet; thence North 12° 27' West 93.83 feet; thence South

72° 33' West 248.24 feet to the Southwesterly line of said land of Brosch, et al.; thence South 42° 51' 01" East 123.55 feet to the point of beginning.

That the judgment for damages given herein is subject to the deduction of the balance of principal due on said note, together with the accrued interest to date hereof.

It Is Further Ordered, that plaintiffs do have and recover their costs herein incurred, taxed at \$37.39.

Dated this 28th day of November, 1955.

/s/ BEN HARRISON,  
Judge.

Affidavit of service by mail attached.

Lodged November 15, 1955.

[Endorsed]: Filed November 28, 1955.

Docketed and entered November 29, 1955. [59]

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[Title of District Court and Cause.]

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause of action having come on regularly for trial before the Honorable Judge Ben Harrison, sitting without a jury, on the 9th day of August, 1955, G. V. Cutler, Esquire, appear-

ing as attorney for the plaintiffs, and William Jerome Pollack, Esquire, appearing as attorney for the defendants, and the Court having heard all the testimony, and the cause having been submitted to the Court and the Court having ordered that the parties submit briefs on the points of law involved in the case, and said briefs having been duly filed herein and the Court having examined the same and being fully advised in the premises, makes its Findings of Fact and Conclusions of Law, as follows:

#### Findings of Fact

The Court finds as follows:

##### I.

That the plaintiffs Jack W. S. Farnell and Elisabeth Pattee Farnell are, and at all times mentioned in the complaint on file herein were, husband and [61] wife.

##### II.

That the defendants, George Wesley Stone and Hildegard W. Stone are, and at all times mentioned in the complaint were, husband and wife.

##### III.

That it is true that on or about the 8th day of October, 1953, the defendants offered to sell to the plaintiffs the defendants' residential real property described by street and number as 13751 Mulholland Drive, Beverly Hills, California, situated in the County of Los Angeles, State of California, and more particularly described as follows, to wit:

That portion of Lot 1107 of Tract 1000 as per map recorded in Book 19, Pages 33 of Maps, in the office of the County Recorder of said County, described as follows:

Beginning at the Southwesterly corner of the land described in the deed to Fritz Brosch, et al., recorded July 25, 1941, as Instrument No. 106, in Book 18602, Page 274 Official Records of said County, said Southeasterly corner being a point on a curve concave Southeasterly, in the Northerly line of Mulholland Highway, 200 feet wide as established by the City Engineer of said City, having a radius of 600 feet a radial line to said point bears North  $32^{\circ} 00' 00''$  West; thence Northeasterly along said curve in said Northerly line through a central angle of  $18^{\circ} 01' 19''$  a distance of 188.73 feet; thence North  $12^{\circ} 27'$  West 93.83 feet; thence South  $72^{\circ} 33'$  West 248.24 feet to the Southwesterly line of said land of Brosch, et al., thence South  $42^{\circ} 51' 01''$  East 123.55 feet to the point of beginning; and

It is true that in making this offer, the defendants made the following representations to plaintiffs:

1. That defendants were the owners in fee of the said residential property;
2. That the improvements thereon consisted of a main residence, [62] a three-car carport, a furnished guest house, a cesspool and septic tank, a swimming pool, walks, driveways, landscaping and other appurtenances, all of which were on the land

hereinabove described and were part and parcel of defendants' residential property owned by them in fee.

3. That the said residential property was well worth the price asked by defendants, namely, the sum of \$38,000.00;

4. That defendants would sell the said property to plaintiffs for the sum of \$38,000.00 on the following terms and conditions:

(1) The total purchase price of \$38,000.00;

(2) A cash down payment of \$6500.00;

(3) An assignment of a note in the face amount of \$5,250.00 carrying interest at the rate of 7% per annum on the unpaid balance, payable full on or before April 15, 1955, and secured by a second trust deed on the former home of the plaintiffs;

(4) The assumption of the obligation to pay and discharge a note secured by a first trust deed on the subject property, the balance of which was then the sum of \$15,083.64;

(5) A note in the sum of \$11,166.36, payable at the rate of \$85.00 or more per month until March 5, 1955, and thereafter at the rate of \$100.00 or more per month, together with 6% interest on the unpaid balance made by plaintiffs, payable to defendants, and secured by a second trust deed on the subject property hereinabove described;

(6) The defendants, as Sellers, would at their cost, furnish plaintiffs, as Buyers, a policy of title insurance in a reputable title insurance company.

IV.

It is true that the defendants were the owners in fee of that land described hereinabove, but it is not true that the improvements thereon consisted of the main residence, a three-car carport, a furnished guest house, a cesspool and septic tank, a swimming pool, walks, driveways, landscaping and [63] appurtenances; and it is true that the boundaries of said land owned by the defendants were in truth and in fact such as to leave one-third of the main residence, all of the three-car carport, the furnished guest house and a proportionate amount of the real property entirely off the defendants' land and on Mulholland Drive owned by the City of Los Angeles; and it is untrue that defendants' land as it actually existed was worth \$38,000.00.

V.

It is true that plaintiffs relied upon plaintiffs' representation and that plaintiffs accepted defendants' offer and did purchase defendants' said residential property hereinabove described, and on or about December 30, 1953, plaintiffs received title thereto and gave to defendants the contractual consideration therefor.

VI.

It is true that the boundary lines of the real property sold by defendants to plaintiffs excluded from the property hereinabove described and sold by defendants to plaintiffs about one-third of the main residence, the three-car carport, the furnished guest

house, the entrance driveway and other appurtenances.

#### VII.

It is true that had plaintiffs known the falsity of defendants' representation as set out in these Findings hereinabove, that they would not have purchased the said property.

#### VIII.

It is true that as a direct and proximate result of defendants' misrepresentation as aforesaid, plaintiffs were damaged in the sum of \$15,000.00.

#### IX.

It is true that plaintiffs made, executed and delivered to defendants the note and trust deed referred to and set out with particularity in Paragraphs III and IV (misnumbered V) of the counterclaim, and it is true that plaintiffs have paid thereon the sum of \$680.00, and it is true that the plaintiffs have not paid to the defendants the balance of the face amount of said note, plus the accrued interest. [64]

#### Conclusions of Law

From the foregoing facts, the Court concludes:

#### I.

That in making the sale of residential real property as set out in the Findings hereinabove, the defendants committed both constructive and actual fraud under the California law governing this case.



II.

That plaintiffs have a right herein to sue for damages.

III.

That the defendants are not entitled to foreclose the Trust Deed set out in their counterclaim, the said Trust Deed and the note secured thereby should be cancelled, and the amount thereof be deducted from the judgment in paragraph IV.

IV.

That plaintiffs are entitled to judgment in the sum of \$15,000.00, and for their costs herein incurred or expended.

Done in open Court this 28th day of November, 1955.

/s/ BEN HARRISON,  
Judge.

Affidavit of service by mail attached.

Lodged November 15, 1955.

[Endorsed]: Filed November 28, 1955. [65]

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[Title of District Court and Cause.]

NOTICE OF ENTRY OF JUDGMENT

To Defendants, George Wesley Stone and Hildgarde W. Stone and to Wm. Jerome Pollack, Esquire, Their Attorney:

You, and Each of You, Will Please Take Notice, and you, and each of you are hereby notified that

judgment in the above-entitled action in accordance with the Findings and Conclusions of Law filed herein was entered in favor of the plaintiffs and against the defendants in the sum of Fifteen Thousand (\$15,000.00) Dollars on the complaint, and that defendants recovered nothing by reason of their counterclaim, plaintiffs to have their costs herein incurred.

Dated: November 30, 1955.

/s/ G. V. CUTLER,  
Attorney for Plaintiffs.

Affidavit of service by mail attached.

[Endorsed]: Filed December 1, 1955. [67]

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[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT  
COURT OF APPEALS

To the Plaintiffs in the Above-Entitled Action:

You Will Please Take Notice that the defendants George Wesley Stone and Hildegarde W. Stone hereby appeal to the United States Court of Appeals for the Ninth Circuit, from the judgment in favor of plaintiffs and against the defendants, entered in the above-entitled action on November 29, 1955.

Dated: December 27, 1955.

/s/ LEO SHAPIRO,

Attorney for Defendants George Wesley Stone and  
Hildegarde W. Stone.

Affidavit of service by mail attached.

[Endorsed]: Filed December 28, 1955. [69]

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In the United States District Court, Southern  
District of California, Central Division

No. 17831-BH

JACK W. S. FARNELL and ELISABETH PAT-  
TEE FARNELL,

Plaintiffs,

vs.

GEORGE WESLEY STONE and HILDE-  
GARDE W. STONE,

Defendants.

Honorable Ben Harrison, Judge Presiding.

REPORTER'S TRANSCRIPT OF  
PROCEEDINGS

Tuesday, August 9, 1955

Appearances:

For the Plaintiffs:

G. V. CUTLER, ESQ.

For the Defendants:

WM. JEROME POLLACK, ESQ.

Tuesday, August 9, 1955—10:00 A.M.

The Court: You may proceed, gentlemen.

The Clerk: Jack W. S. Farnell and Elisabeth Pattee Farnell vs. George Wesley Stone and Hildegarde Stone, No. 17831-BH.

Mr. Pollack: Ready for the defendants, Your Honor.

Mr. Cutler: We are ready, Your Honor.

The Court: You may proceed, gentlemen.

Mr. Cutler: If Your Honor please, I would like to show the listing in this case to counsel to see if we can stipulate as to its admission in evidence.

Mr. Pollack: We will stipulate that these documents may be received.

The Court: They will be admitted and the clerk will mark them.

The Clerk: Do you want them marked separately or together?

Mr. Cutler: Together as a group.

The Clerk: Plaintiffs' Exhibit 1.

(The exhibit referred to was marked Plaintiffs' Exhibit 1 and received in evidence.)

Mr. Cutler: The plaintiff would like to call Mr. Deutsch. [3\*]

ANTON DEUTSCH

called as a witness by the plaintiffs, being first sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Anton Deutsch.

Direct Examination

By Mr. Cutler:

Q. Mr. Deutsch, where do you reside?

A. Sherman Oaks, in the Valley.

Q. That is in this county? A. Yes.

Q. And what is your occupation?

A. Real estate broker.

Q. Are you associated with any other broker?

A. Yes, Chavin.

Q. Where is your office?

A. 14415 Ventura Boulevard, Sherman Oaks.

Q. Sometime in the latter part of 1953 did you see a listing of property located on Mulholland Drive that had been listed by Mr. and Mrs. Stone in that office? A. Yes.

Q. And did you have any inquiries about a sale?

A. Yes.

Q. Did you talk with Mr. and Mrs. Farnell about the purchase of that? [4] A. Yes.

Q. About when did that occur?

The Court: Just a moment, gentlemen.

I have had preliminary statements from counsel on both sides. Can't you stipulate to a number of these facts?

As I understand from the statements of counsel

(Testimony of Anton Deutsch.)

this property was sold by the seller to a purchaser and afterwards the property was surveyed and it was found that all the improvements were not on the property sold.

Mr. Pollack: That is correct, Judge Harrison.

The Court: There had been a mistake as to the boundaries.

Mr. Cutler: That is so stipulated and that is the fact.

The Court: Now, why do we have to go through all this detail when the main story is very simple?

Mr. Cutler: May I, Your Honor, in this case then refer to only two or three questions in regard to statements made by the parties as to the boundaries?

The Court: Yes.

Q. (By Mr. Cutler): You later then showed the property to Mr. and Mrs. Farnell, the final purchasers of the property, did you, Mr. Deutsch?

A. Yes.

Q. And did you have a chance to talk either with Mr. Stone, the owner, or with his wife, Mrs. Stone? A. I talked to Mrs. Stone. [5]

Q. Mrs. Stone. And did she at that time when you were on the property point out to you what it included?

A. Not in that respect. The only thing we discussed were terms and financing more than anything else.

Q. Did she at any time refer to the boundaries?

(Testimony of Anton Deutsch.)

Mr. Pollack: I object to that. The witness said no.

The Court: I think he can answer the question.

The Witness: No.

Q. (By Mr. Cutler): Did she show you whether or not the carport was on the property?

A. She showed us that the carport was there.

Q. And the guest house? A. Yes.

Mr. Pollack: Just a moment. I object to the testimony unless it is given in question and answer form.

The Court: Just a moment. I will take care of that.

Mr. Pollack: I move to exclude the answer, Your Honor.

The Court: Who did you first interview on that property when you went out there?

The Witness: Well, actually, I submitted an offer to Mrs. Stone.

The Court: You talked to Mrs. Stone?

The Witness: Yes.

The Court: Did she show you the property?

The Witness: No. It wasn't the property—the property [6] was obviously there and she showed us the features of it like the construction and layout.

The Court: What did she show you in that respect?

The Witness: Just the fact that it is a two-story house and she showed us the guest house, the inside of it and where the pool was.

The Court: Showed you where the pool was?

(Testimony of Anton Deutsch.)

The Witness: Yes.

The Court: Show you where anything else was?

The Witness: Yes. There is a road in back of it which she showed us, where there is a circular drive.

The Court: How about the carport?

The Witness: She showed us where it was because you drove right into it.

The Court: You drive right into it?

The Witness: In driving down, yes.

The Court: And you had a listing?

The Witness: Yes.

The Court: On the property?

The Witness: That is right.

The Court: Where is that listing?

Mr. Cutler: Is this the listing here?

The Court: I thought you said that was the escrow.

Mr. Cutler: This is the original listing with Mr. Deutsch and Mr. Chavin, is that right? [7]

The Witness: Yes—not with me but with Mr. McNally.

Q. (By Mr. Cutler): He was with the same broker? A. Same office.

Q. Did you have that with you when you went out there? A. I had a copy of it, yes.

The Court: You had a copy of it?

The Witness: Yes.

The Court: May I see it, counsel? I notice on here it says something about a guest house now being rented for \$175 per month.



(Testimony of Anton Deutsch.)

The Witness: Yes.

The Court: Did she show you that property?

The Witness: Yes.

The Court: And "a terrific view" too?

The Witness: Yes.

The Court: I can't read this writing. It is nearly as bad as mine.

The Witness: Look at the photostatic copy.

The Court: You just had this property listed as a certain address, didn't you?

The Witness: That is all.

The Court: I think that is all the questions I have to ask.

Q. (By Mr. Cutler): Do you recall that you were requested by the prospective purchasers, Mr. and Mrs. Farnell, to find [8] out from Mrs. Stone where the southern boundary was?

A. No, I don't.

Q. And do you recall any further conversation with Mrs. Stone as to the southern boundary?

Mr. Pollack: Just a moment, your Honor. As I understand the testimony there is no evidence that he had any conversation regarding any boundary. The question propounded assumes a fact not in evidence.

The Court: I will ask a question. Did you discuss the size of the lot?

The Witness: We discussed it generally in the beginning.

The Court: What was said, do you know?

The Witness: An acre almost.

(Testimony of Anton Deutsch.)

The Court: With Mrs. Stone?

The Witness: Yes, I believe so. I never met Mr. Stone. He was in New York.

The Court: And what was said about the boundary of the property?

The Witness: Just the general size of it—almost an acre.

The Court: What?

The Witness: That it was almost an acre or three-quarters of an acre.

The Court: Did she point out where the lines were or anything? [9]

The Witness: No. We weren't frankly, interested in that at the time. I was trying to put over an offer and the terms of an offer but we didn't bother too much about boundaries or anything. It was just whether they would accept it or not.

Mr. Cutler: That is all.

The Court: May I ask, gentlemen, was this property sold by lot number?

Mr. Pollack: Meets and bounds—I am not sure about it.

Mr. Cutler: This was a portion—there was a portion sold as a portion of a lot, your Honor, and then there are metes and bounds description. The deed refers to that portion 1107 of Tract 1,000, and then beginning at the southwesterly corner and going around metes and bounds.

The Court: Why don't you introduce the deed?

Mr. Pollack: I will stipulate it may go into evidence.

Mr. Cutler: We will offer it next in order.

The Court: Admitted.

The Clerk: Plaintiff's Exhibit 2 in evidence.

(The exhibit referred to was marked Plaintiffs' Exhibit 2 and received in evidence.)

The Court: Call your next witness.

Mr. Cutler: Mr. Jones. [10]

DON P. JONES

called as a witness by the plaintiffs, being first sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Don P. Jones.

Direct Examination

By Mr. Cutler:

Q. Mr. Jones, you reside in the county here, do you?  
A. I do.

Q. What is your occupation?

A. I am a licensed land surveyor.

Q. What are your qualifications?

A. I am licensed in the——

The Court: Just a moment.

Mr. Pollack: I am willing to stipulate with regard to the surveyor—there is no question about that.

Q. (By Mr. Cutler): Let me ask then in regard to that. Did you bring with you a survey you had made for Mr. Farnell about December, 1953, on his property upon Mulholland Drive?  
A. I did.

(Testimony of Don P. Jones.)

Q. Would you kindly produce a copy of that?

(Handing document to Mr. Cutler.)

Mr. Pollack: It may be stipulated that that survey may be received in evidence, your [11] Honor.

The Court: Do you stipulate it is a correct survey?

Mr. Pollack: Yes.

The Court: The clerk has just called my attention to the fact there is no record of a waiver of a jury in this case.

Mr. Pollack: The record may show on behalf of the defendants that a jury is waived.

Mr. Cutler: We concur in that waiver, your Honor.

Q. (By Mr. Cutler): I would like you to point out if you will, please, by referring to one of these drawings, Mr. Jones——

The Court: Give him the one that has been introduced in evidence.

The Clerk: Plaintiff's Exhibit 3 in evidence.

(The exhibit referred to was marked Plaintiffs' Exhibit 3 and received in evidence.)

Q. (By Mr. Cutler): Mr. Jones, I show you Plaintiff's Exhibit 3 which is your survey of the property and I wish you to point out to the lines you established of the lot. Do you care to come over here, Mr. Pollack?

Mr. Pollack: Thank you very much. I am

(Testimony of Don P. Jones.)

familiar with it and I said it may be offered in evidence.

Q. (By Mr. Cutler): I wish you would point out to the court where the boundaries lie as to the property and where [12] you established the south boundary line.

A. The boundary is this heavy line with the curve being the southerly boundary. This is the location of the car port which is south of the boundary line.

Q. Where is Mulholland Drive?

A. It is from this line southerly 200 feet wide.

Q. What portion of the improvements then lie outside of the boundaries of this property? Would you point to them as you refer to them?

A. The entire carport and part of the two-story house; all of the guest house and part of your paving and concrete patio.

Q. Now, this is on a steep mountainside, is it not? Would you kindly refer to the edge of the brink or fill for the house, please, show where that is?

A. The topography is indicated by this dashed line. This is fairly level in here and then this is the bottom of a bank coming down from Mulholland Drive. This is the access road from the paved portion of Mulholland Drive to the parking area.

Q. Approximately how much higher is Mulholland Drive up here which is used as a highway, how much higher than the level of the carport and residence? A. I would estimate 25 feet.

(Testimony of Don P. Jones.)

Q. About 25 feet? [13]           A. Yes.

Q. And then you have indicated a line on the top of the bank. Is that the top of the bank?

A. Yes, sir.

Q. And then beyond that to the northward what is the condition? It is a steep bank downward?

A. Apparently there has been a fill.

Mr. Pollack: Just a moment. I object to the question as leading and suggestive.

The Court: You are getting pretty technical this early in the morning, counsel. May I ask is there room to move that house back?

The Witness: Not without moving something else.

The Court: What else would you have to move?

The Witness: The pool, the guest house would have to go approximately where the pool is. In other words, it cannot be moved this way because of the condition of the ground. This is the edge of the bank here and in my opinion this is as close to the edge of the bank now as it should be. It would have to be moved over in this area here which would—

The Court: How about the house?

The Witness: The house could be moved back—could be moved northerly.

Q. (By Mr. Cutler): Would there be any room then for the carport? [14]

A. There would be barely enough room. At the best it would be very close. It would depend on the condition of the ground here. I doubt it—I doubt it would be able to move this far.

(Testimony of Don P. Jones.)

The Court: There would be room between the guest house and the residence, wouldn't there, for the carport?

The Witness: Well, if the guest house went in here there might possibly be room here, but it would be a very crowded condition.

The Court: We are living in a very crowded period and age, aren't we?

Q. (By Mr. Cutler): Moving it forward as you have suggested, Mr. Jones, would eliminate the pool?

A. That is correct.

Mr. Cutler: You may cross-examine.

#### Cross-Examination

By Mr. Pollack:

Q. Actually, Mr. Jones, there is room there to accommodate the house and the carport and the guest house regardless of how it would be worked out? There is enough land to accommodate those three buildings, isn't there?

A. I believe so.

Q. And the pool could be moved over to the extreme edge of it?

The Court: You can't move a swimming pool, counsel. You [15] would have to build a new one, wouldn't you?

Mr. Pollack: That is what I meant, your Honor.

Q. (By Mr. Pollack): There is room to build a pool at the edge of the property, isn't there?

A. I wouldn't want to build a pool at the edge



(Testimony of Don P. Jones.)

of a bank because of your side condition. I don't think it would stay there. You would have to have enough buffer from the edge of the bank because the weight of the pool and the water in it would give you a tremendous push.

Q. How many feet of buffer do you think you would need?

A. Approximately what is shown there. I would say 20 foot.

Q. Now, when you say that you didn't think the house could be moved in this direction, what you had in mind, had you not, was taking the house and moving it in its entirety off of its present foundation, is that correct?

A. That is true, except the house and carport in the same relationship there—there is not enough room on the level area to move it back so they would both fall within the lot.

Q. That is the carport, but the house itself encroaches only about 10 feet on one side and 13 feet on another side. Is that about right?

A. Correct.

Q. And so all you would have to do would be to move the [16] house back that distance to get it off the encroachment?

A. Yes, sir, plus any building set-back.

Mr. Pollack: That is all.

Mr. Cutler: Thank you, Mr. Jones. You may be excused.

The Court: Call your next witness.

Mr. Cutler: Mr. Baehr.



P. D. BAEHR

called as a witness by the plaintiffs, being first sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: P. D. Baehr.

Direct Examination

Mr. Cutler: Your Honor please, we are presenting Mr. Baehr as an expert appraiser and I would like him to take his qualifications.

Would you state those, please?

The Witness: Your Honor, I have had 25 years' experience in appraising with the California Bank from 1926 until 1942.

During that time I had experience in all phases of real estate selling, buying, mortgage loans and appraising.

I was a member of the Branch Location Committee, member of the Real Estate Loan Committee and as chief appraiser when I resigned in 1942. And since 1947 I have been an independent appraiser.

The Court: Do you belong to any societies? [17]

The Witness: Yes, I do. The Los Angeles Realty Board, American Institute of Real Estate Brokers, American Right-of-Way Association, American Institute of Real Estate Appraisers.

Q. (By Mr. Cutler): And are you acquainted with the subject property in this case, Mr. Baehr?

A. Yes. I was given an assignment to make an appraisal of the property.

(Testimony of P. D. Baehr.)

Q. Have you seen this survey map that was prepared by Mr. Jones, who was just on the stand, Plaintiffs' Exhibit 3?

Mr. Pollack: I object to any question regarding this property. The evidence thus far does not disclose that this witness is an expert in the particular type of property and in the particular location that is the subject of this lawsuit.

The Court: Well, do you want to spend more time on that?

Mr. Pollack: I would like to briefly take this witness on voir dire if I may, your Honor.

The Court: You want to take him on voir dire?

Mr. Pollack: Yes.

The Court: Very well, you may do so.

#### Voir Dire Examination

By Mr. Pollack:

Q. Mr. Baehr, have you ever appraised any property on Mulholland Drive?

A. Yes, I have. [18]

Q. How recently?

A. The most recent one—I don't recall exactly, but I think about four months ago.

Q. Whereabouts on Mulholland Drive was it?

A. I can't recall the address. It was east of the subject property.

In 1953 I made an appraisal of property located at 3285 Coy Drive, which is at Mulholland and Beverly Glen. That is about three-fourths of a mile

(Testimony of P. D. Baehr.)

from the subject property. It was residential property.

Q. That was about two years ago?

A. 1953, right.

Q. Of course the value of property in that area fluctuates, does it not, from year to year?

A. Well, my appraisal assignment was to appraise property as of the date of the sale which was 1953.

Q. And what other properties have you surveyed or appraised in that area?

A. Oh, I have appraised properties all over Los Angeles County. I can't recall. Many properties in the Valley, Sherman Oaks, Sepulveda Drive—Boulevard. I can't recall offhand. I have appraised very many properties.

Q. Do you know what canyon this property is near?

A. Well, it is near Beverly Drive. It is west of Laurel Canyon. It is near Coldwater Canyon. You go up [19] Coldwater Canyon and Beverly Drive.

Q. Have you appraised any properties recently on Beverly Drive or Coldwater Canyon?

A. I don't recall any on Beverly Drive. I have appraised properties on Coldwater Canyon, I believe lower down—not up on Mulholland Drive.

Q. What is your present business, sir?

A. I am a real estate broker and appraiser.

Q. Do you spend most of your time as a broker or most of your time as an appraiser?

A. My time is spent appraising.

(Testimony of P. D. Baehr.)

Q. Have you ever testified in court regarding the value of any property in that area?

A. Yes. I have testified in the Los Angeles Superior Court, Los Angeles Municipal Court and United States Federal Courts. I have made appraisals for the Lands Division of the Department of Justice.

Q. With regard to property in the area that we are talking about?

A. No, not on Mulholland Drive. An appraiser has assignments all over everywhere.

Q. I understand that but I am particularly interested in property in that area.

A. I believe I have answered that.

Q. Four months ago you think you appraised a piece of [20] property on Mulholland Drive, is that correct?

A. I am sure I appraised one. I don't recall whether it was exactly four months. It may have been this year sometime, the first of the year.

Q. You don't remember the address of that property?

A. I don't remember it, no. It was a single family residence. It was a property that the owner wished to sell and wanted to get the market price.

Q. Was this appraisal in connection with a listing that you were taking on it?

A. I didn't take the listing. They retained me to set a market value of the property.

Q. Did they pay you for doing that?

A. Yes, they did. I don't work without pay.

(Testimony of P. D. Baehr.)

Q. I mean were you employed as an appraiser?

A. I was employed as an appraiser.

Q. Now, aside from that piece of property and the other piece that you say you appraised two years ago, have you appraised any other property on Mulholland Drive?

A. I can't recall any specific property at this time. I know I have looked at Mulholland Drive many times but I can't recall any specific property.

Q. How close is the nearest piece of property that you do recall having appraised?

A. Three-fourths of a mile. [21]

Q. On what street was that?

A. That was on Coy Drive. It is right off of Beverly Glen and Mulholland Drive.

Q. How long ago was that? A. 1953.

Q. That is the same piece of property?

A. That is right.

Q. What did you say was the nearest canyon to this house on Mulholland that is the subject of this lawsuit that you appraised?

A. The nearest canyon?

Q. Yes.

Mr. Cutler: I don't believe the question is clear. Did you say that he appraised?

Mr. Pollack: I understood that he has appraised the Farnell property.

Mr. Cutler: Yes.

Mr. Pollack: And I want to know if he knows

(Testimony of P. D. Baehr.)

what the nearest canyon is to the Farnell property.

The Witness: On the southerly side I assume you are speaking of?

Q. (By Mr. Pollack): Yes.

A. Well, there is Laurel Canyon, Coldwater Canyon. I can't recall right now the name of the canyons along there but they are all on the south side. The street ends at [22] Mulholland Drive.

Q. Don't these canyons run north and south?

A. That is right. They end at Mulholland Drive and the subject property is on the north side of Mulholland Drive.

Q. Well, assuming Mulholland Drive runs generally east and west what would it be near?

The Court: I don't think that is a proper question on voir dire. I want to know what this man has done in preparation for this appraisal. You worked for the Land Division. You know what you have to do.

The Witness: Yes, but I wasn't asked——

The Court: I am asking.

The Witness: All right, sir.

The Court: What did you do in preparing yourself for this appraisal?

The Witness: I made an inspection of the property and all improvements. I secured a map and studied the survey.

I checked the public records for sales to find sales comparable to the property.

I found one of a vacant lot practically joining the

(Testimony of P. D. Baehr.)

subject property of about a half acre. It sold—may I give the complete reference or do you just want it for——

The Court: Counsel, in this case we are not interested so much in the value of the lot. It is the location of the improvements on the lot that the complaint is about. Isn't [23] that true?

Mr. Pollack: I was trying to determine how well acquainted with the area this man is and apparently he doesn't know Benedict Canyon is the nearest canyon.

The Witness: I couldn't think of the name of it.

Mr. Pollack: That is all the voir dire I have, your Honor.

I object to the question on the ground that this witness does not appear to be sufficiently familiar with the values of property in the area of the property—that is the subject property of this lawsuit.

The Court: Objection is overruled. I don't think, gentlemen, in this case we are so much interested in the value of the lot as we are interested in the amount of money it will cost to put this property in a proper setting.

Mr. Pollack: That is right.

The Court: Isn't that true?

Mr. Pollack: That is very true.

Mr. Cutler: I think, if your Honor please, it would be very pertinent to show the value of the property in December of 1953 as if the purchaser had gotten what he thought he was getting, the



(Testimony of P. D. Baehr.)

value of that property as a unit with the improvements on it.

The Court: I thought everybody was satisfied with what they paid for the property if they had gotten what they [24] thought they were getting.

Mr. Cutler: That is right.

Mr. Pollack: That is true.

The Court: In other words, the sale price was \$38,000.

Mr. Cutler: If we had gotten the property—

The Court: The purchaser was satisfied until he found out their house wasn't on the lot that they thought they bought and the seller was satisfied because he sold the property. Isn't that true?

Mr. Pollack: That is correct, your Honor.

The Court: So the whole question here is what damage has resulted by reason of the house not being located on the property.

Mr. Pollack: That is correct.

Mr. Cutler: That is right, your Honor. Now in that connection then, Mr. Baehr, did you make an appraisal of the property in the first instance as to what it would be worth as it appeared if the purchaser had gotten what he saw?

Mr. Pollack: Object to the question, your Honor. I think it is material. I think we are agreed on that.

Mr. Cutler: As a preliminary matter I want to establish that and then ask him what his appraised value was of the property at that time as it actually surveyed.



(Testimony of P. D. Baehr.)

The Court: I think we can assume the property was worth \$38,000 had the improvements been on the land that the [25] plaintiff here thought he was getting, can't we?

Mr. Cutler: We can do that, your Honor, yes. I would like to state one thing—

The Court: Then what was the property worth in the condition that it finally developed it was in.

That is what we are interested in.

Mr. Pollack: That is right.

Q. (By Mr. Cutler): Would you give us the answer to that question which the court has propounded, the value as it was actually existing?

A. In my opinion the market value as the property actually existed is \$10,600.

My market value of the property as it appeared to exist was not \$38,000. There was personal property involved which cut the value down.

Q. However, in adding on the \$2,500 value of personal property you did arrive at essentially the same figure, did you not?

A. That is correct.

Q. \$37,000? A. Correct.

Q. Then as it actually existed you have given a market value at that time of \$10,600?

A. That is correct.

Mr. Cutler: Cross-examine. [26]

(Testimony of P. D. Baehr.)

Cross-Examination

By Mr. Pollack:

Q. How did you arrive at the figure of \$10,600?

A. Well, I took into consideration the actual size of the usable lot, the size, condition of the improvements as they existed.

Q. Let us take one thing at a time. You say you took into consideration the actual size of the usable lot. is that correct?

A. That was one of the factors, yes. There were many more factors.

Q. Yes, I understand that. Now, what did you figure that was worth?

A. The size as it actually existed if unimproved in my opinion would have had a market value of \$5,000.

Q. When you searched the records did you find any sales for any lots for the sum of \$5,000 in that area?

A. Yes. The adjoining property sold for \$4,500.

Q. How did that compare in size?

A. The adjoining property was larger.

Q. How do you know it was larger?

A. Well, from the maps.

Q. You can't tell from a map, can you, what the usable size of a lot is?

A. I can from an inspection. [27]

Q. You said you determined it from a map.

A. I said that was part of it. I said from a map and the inspection.

(Testimony of P. D. Baehr.)

Q. You mean you went out there and looked at the property?

A. It is visible from the Farnell property.

Q. I am just saying you stood on the Farnell property and looked at this adjoining lot?

A. And I talked to the owner.

Q. Let us take just one thing at a time. You talked to the owner of the lot?      A. Yes.

Q. And where was the owner when you talked to him?      A. The owner?

Q. Yes.

A. I talked to him here in the courtroom.

Q. That was just this morning, wasn't it?

A. Yes. I talked to him here this morning.

Q. And prior to talking to him this morning you never talked to him before, did you?

A. No, I never talked to him before. It was a verification.

Q. We will come to that.

A. I have a right to answer your question.

Q. Well, go ahead. Tell me when you are through. [28]      A. I am through.

Q. Now, you went out on the Farnell property and you looked next door at this lot. is that correct?

A. That was part of the investigation, yes.

Q. In addition to that you looked at a map of the property?      A. I checked the maps.

Q. Where did you check the map?

A. I checked the assessor's records. I have a copy of the map.

(Testimony of P. D. Baehr.)

Q. That you did in the Hall of Records or Hall of Justice?

A. That was the official map. That is where I would generally go.

Q. I wanted to know where you went to look at it.

A. Hall of Records—in the assessor's office.

Q. Where is the assessor's office.

The Court: What do we care?

Mr. Pollack: I would like to find out whether he actually went there.

The Witness: I assure you I did.

Q. (By Mr. Pollack): You went to the assessor's office and you stood on Farnell's property and in that way you determined the usable size of that lot?

A. Well, that was generally, yes. [29]

Q. Did you do anything else?

A. In what respect?

Q. Well, did you locate the lot lines?

A. No, I didn't make a survey. That wasn't my job.

Q. Without a survey you couldn't actually tell, could you, the usable size of that lot?

A. Well, it is now improved. The appearance of it would appear to be a certain size.

Q. You couldn't tell where the boundaries were, could you?

A. I made no survey. That is not my business.

Q. You didn't walk over the lot? A. No.

(Testimony of P. D. Baehr.)

Q. How many square feet is there that is usable in the lot next door?

A. I would just have to guess at that.

Q. I don't want you to guess. Did you ever determine the number?

A. I can go out and measure it but I would have to guess at it here.

Q. So even to this day you don't know the number of square feet in that lot, do you?

A. No, I don't know the number of square feet.

Q. Do you know the number of square feet in the Farnell lot? [30]

A. Yes, sir.

The Court: Do you know the number of square feet in this building?

Mr. Pollack: I am not testifying here.

The Court: I was just wondering.

Shall we put the surveyor back on the stand to show how many square feet of usable ground there are here, counsel?

Mr. Pollack: I think your Honor is missing my point. This witness testified that he came to an opinion regarding the value of the Farnell lot by comparing it with a lot next door.

Now, my point is unless he knew the number of square feet in the lot next door he had no basis for comparison. It might have been a lot more or less.

The Witness: May I make a correction? I did not state I was comparing the value of the lot next door in this case. That is only one factor.

The Court: Counsel, let us find out how he arrived at this figure of \$10,600 for this property. Let

(Testimony of P. D. Baehr.)

us break it down and find out what comprises that figure.

Did you consider the availability of moving some of this property?

The Witness: Yes, your Honor.

The Court: What did you figure it would cost to move that house? [31]

The Witness: There were bids on that. The cost to relocate, decorate and landscape was around \$13,200.

Mr. Pollack: Just a moment, your Honor—I object to that. This man is depending upon some hearsay—something that has been told to him.

The Court: That is what all appraisers do.

Mr. Pollack: In their field, though. He is not appraising real estate when he is appraising the cost of moving a house.

The Court: Now, just a moment. Let us be fair here. The court is interested in finding out if this property can be relocated on that lot and if so what it would cost.

Now, if this man can give us some help on it why not have him do so?

Mr. Pollack: I am just as anxious for that help as you are, your Honor.

The Court: You don't seem to be.

Mr. Pollack: Well, I just thought we ought to get it from someone in the business of moving houses and not from a real estate appraiser. That is just my thought in the matter.

(Testimony of P. D. Baehr.)

The Court: Well, if he has an estimate here from somebody do you want to bring them in?

Mr. Pollack: I would rather they brought in their mover.

Mr. Cutler: We have a call in for Harry Bernasconi who made a careful estimate here and I have here his estimates [32] in the file. He should be here at 2:00 o'clock. I thought perhaps we wouldn't need him until 2:00. He should be here at 2:00 o'clock. Possibly the court might permit this testimony subject to his appearing.

Mr. Pollack: That will be all right.

The Court: Proceed.

The Witness: Other factors I considered in affecting the market value was the size of the site in relation to the existing improvements, and that if the existing structures were relocated the site would present a very crowded appearance which would, in my opinion, definitely affect the market value of the property from a purchaser's standpoint.

Then of course the cost to relocate the improvements and the cost of landscaping and even though the improvements were relocated the difficulty in financing the improved property and other factors were considered in the situation—the style of the house. It was originally a duplex which had already been remodeled once. The guest house has been added onto at various times and the situation would be better if it were developed with a more modern type of house.

Of course the location of the pool in the center



(Testimony of P. D. Baehr.)

of the lot definitely would restrict the location of the improvements to the best advantage.

The Court: How many rooms does that house have in it?

The Witness: The house has, if I recall, seven rooms, [33] seven rooms and two baths. And on the first floor there was a rumpus room with a fireplace and a bar, three bedrooms and the bath.

The house was originally built in 1947. It was remodeled in 1951 and 1953. There was a large bedroom, dining room, storage room and kitchen and bath.

The house had 2,380 square feet in it. The guest house was on a concrete slab foundation. It was built in 1948. It had four rooms and a bath. The rooms are in tandem arrangement. There is no central hall. You go from one room to another. It is a nice, attractive guest house but the construction is such that it would be rather difficult to move. It could be moved but it would be difficult to move to advantage.

The carport was built in 1953. It is open on three sides. The rear line is concrete blocks against the bank. The back originally had a reinforced concrete retaining wall and when the carport was rebuilt the building department required restrengthening so they put a concrete wall in which now becomes part of the retaining wall as well as the rear line of the carport.

It would be very difficult to move the carport to any advantage on the existing lot. I have marked



(Testimony of P. D. Baehr.)

up one of the surveys showing the lines of the usable site and the location of the improvements. [34]

Q. (By Mr. Cutler): Do you have that with you?      A. Yes.

Q. What have you attempted to show here, Mr. Baehr?      A. (No answer.)

The Court: This is really cross-examination and I was interfering, counsel.

Mr. Pollack: I think that had to do with his voir dire.

The Court: He said he was your witness, counsel.

Mr. Pollack: Then he started in to ask some more questions but if he is through I would like to continue on if I may.

Mr. Cutler: Yes.

Q. (By Mr. Pollack): What did you think it would cost to build that house?

A. May I have the question again, please?

Q. What is your opinion as to how much it would cost—      A. To build the house?

Q. Yes.

A. I don't know what it cost to build the house in 1947. I made no appraisal of that. My appraisal was as of December, 1953.

Q. What would it have cost in 1953 to build that house?      A. My estimate—

The Court: It isn't a question of what it cost to build the house, but what the house was worth. [35]

A house built in 1947 would be a different house than one you were building in 1953.

(Testimony of P. D. Baehr.)

Mr. Pollack: Part of the house, your Honor, was rebuilt, I believe, in 1954 but I won't press the point.

The Court: You figured this on a footage basis?

The Witness: Yes.

The Court: And you said there are 2,800 feet?

The Witness: 2,300.

The Court: 2,300?

The Witness: That is right.

The Court: What did you figure?

The Witness: My estimate of the replacement value in 1953 was, for the residence, \$8.50 a square foot.

Q. (By Mr. Pollack): How about the guest house?

A. The guest house had 848 square feet and the replacement value, according to my estimate, was \$7.00 a square foot.

Q. And what did you figure the car port was worth?

A. 704 square feet at \$2.50 a square foot. And then there was the pool and landscaping which was also a part of the improvements.

The Court: What did you appraise the pool at?

The Witness: I allowed \$4,000 for the pool. It is not a finished pool. It had the appearance of being rather homemade. I don't know who built it.

The coping was lacking on the pool. It had a filter [36] system but no heating system, no diving board but a ladder which was added subsequent to the purchase.

(Testimony of P. D. Baehr.)

I made an allowance of \$2,000 for landscaping. That totaled \$33,890 to save you adding.

Q. (By Mr. Pollack): Thank you. Now these estimates that you got regarding the cost of moving, whose estimates have you used?

A. Star House Movers' estimate.

Q. And what is the date of that estimate?

A. I don't recall the date. I don't have it with me.

Mr. Cutler: We have the estimate here.

Mr. Pollack: Well, I will ask for it in just a moment.

Q. (By Mr. Pollack): All you were shown was an estimate by the Star House Moving Company?

A. I was willing to accept that figure although in my opinion it probably would cost more to move the house because of the condition of the house, the foundation and the possibility of running into some filled ground at the back. That was uncertain although for this market value I was willing to accept that estimate.

Q. Did you ever move a house yourself?

A. No, I never did.

Q. You were never in the house moving business?

A. No, but I have seen a lot of houses moved.

The Court: The court has had some experience in house [37] moving and I will tell you if you have to do it don't try it.

Q. (By Mr. Pollack): If the guest house was removed completely there would be ample room for

(Testimony of P. D. Baehr.)

the pool, the car port and the house, is that correct?

A. Well, I wouldn't say ample. I would say that you could get the house on the lot. The house can be moved on the lot and so can the guest house but you wouldn't have the same type of property. It would make it an entirely different type of property.

Q. But if you eliminated the guest house you would have ample room for the car port, the pool and the house?

A. Well, it depends on how you define "ample." I would say no, you wouldn't have ample room. The square footage wouldn't be available.

Q. You would have the extra room that you didn't have if you didn't rebuild the guest house, isn't that true?      A. To rebuild it?

Q. In other words, you can get it all on the usable part of that lot, can't you, but you say it would be a little crowded?

A. I made a sketch to scale and moved the house around on the lot and you can put them on the lot but as far as being ample space in my opinion it would not be.

Q. Now, if you eliminated the guest house you would [38] have all the room you want, isn't that true?

A. No. You would have an entirely different property. It would be entirely different. You wouldn't have the same type of property. You wouldn't have the guest house.

(Testimony of P. D. Baehr.)

Q. Well, I am just talking about your position that because of the guest house, the carport, the pool and the main house that it would be a little crowded, isn't that what you said?

A. If they were relocated on the existing situation—existing site, yes.

Q. Now, if you eliminated the guest house you would have ample room?

The Court: That is self-evident, counsel. If they eliminate part of the improvements they would have more room.

Mr. Pollack: That is all.

#### Redirect Examination

By Mr. Cutler:

Q. In connection—we might offer in evidence this diagram that he has drawn here for possible relocation.

The Witness: That is no relocation on that map.

Q. (By Mr. Cutler): Did you have a drawing for the relocation?

A. No, just an overlay.

Q. Perhaps then that would not be so usable. That is all, then. By the way, did you take pictures of the place [39] while you were there?

A. Yes, I took some photographs.

Mr. Cutler: If your Honor please, it might help in visualizing this matter to have the photographs in. I would like to show counsel some of the photographs. They might be of some benefit to the court in visualizing this situation a little better.

(Testimony of P. D. Baehr.)

(Documents handed to Mr. Pollack.)

Mr. Pollack: I think it should be explained to the court. I have no objection to them.

The Court: Those are pictures of the property?

Mr. Pollack: Yes.

The Court: Are they pictures of different portions of the property?

Mr. Cutler: Yes, from different points of view. The different portions of the premises are shown and also the structures.

The Court: Have them introduced as one exhibit in the envelope.

Mr. Cutler: We offer these, if your Honor please, as Plaintiffs' Exhibit No. 4.

The Court: Admitted.

(The exhibit referred to was marked Plaintiffs' Exhibit 4 and received in evidence.)

Mr. Cutler: That is all, Mr. Baehr, thank [40] you.

The Court: Call your next witness.

Mr. Cutler: You are excused as far as the plaintiff is concerned.

The Court: May this witness be excused?

Mr. Pollack: Yes.

Mr. Cutler: Mr. Deutsch and Mr. McNally may be excused and is there any objection to excusing Mr. Jones, the surveyor?

Mr. Pollack: He may be excused.

Mr. Cutler: We would like to call Mr. Bernasconi of the Star House Movers.

HARRY BERNASCONI

called as a witness by the plaintiffs, being first sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Harry Bernasconi.

Direct Examination

By Mr. Cutler:

Q. Mr. Bernasconi, you reside here in the county?      A. Yes, I do.

Q. And you are in business?

A. I am the manager of Star House Movers.

Q. And about how long have you been so engaged?

A. I have been with the firm for 28 years.

Q. During that time you have personally and as manager of the company moved many houses, have you not? [41]      A. Yes, I have.

Q. And were you called by Mr. Farnell in this case, to make an estimate of moving certain houses on the property at 13751 Mulholland Drive?

A. I was.

Q. And was that about October of 1954, last year?

A. Yes. The letter dated to him was in October so it was around the 1st of October.

Q. Did he ask you to give him an estimate as to the cost of moving the carport and guest house and residence so they would all be on his lot?



(Testimony of Harry Bernasconi.)

A. He did.

Q. And did you do that?

A. Yes, I did.

Q. And what was the cost as you estimated it?

A. Well, this letter I wrote confirming my verbal bid to Mr. Farnell was for \$7,400. This bid included the moving and installing new foundations and replacing the floor joists which are now dry rotted, and reconnecting the plumbing, stuccoing the exterior of the bottom of the building, all electrical repairs, replacing the fireplace, replacing the porches and all the flat work and reconnecting the plumbing.

Q. That was for which structure?

A. That was for the main house. That did not include any painting or decorating. [42]

Q. That would be in addition?

A. That is right.

Q. And your estimate of the moving—after moving the house would it be necessary to do any painting and redecorating?

A. Yes. It is always necessary. In the way that house is built there are several walls that have to be replaced because the house is built against a bank and the retaining wall is a portion of the main body of the building which will be lost in the moving of the building. Those will have to be replaced and replastered.

Q. Did you make any estimate as to what that additional cost would be?

A. No, we did not make any additional estimates



(Testimony of Harry Bernasconi.)

on the painting or decorating, but this included replacing those walls.

Q. Now, did you make an estimate as to moving any other portion of the structures?

A. Yes. We made a figure estimate on moving the guest house.

Q. And what was that, please?

A. Well, I don't have that. I believe I had the repairs to the guest house which consisted of putting in a new floor and reconnecting the plumbing, but which did not include any floor covering. The figure on that was \$1,980, plus [43] \$1,500 on the moving.

Q. Making a total of \$3,380?

A. That is right, on the guest house.

Q. Did you make somewhat of an estimate as to the condition the houses would be in as to proximity, closeness and so on to the lines after you made that kind of a move?

A. Well, we didn't go into too much detail.

Mr. Farnell, I believe, had a plot plan there and it showed the building would have to be moved, I believe 23 feet, to be on his property.

Q. That was the main residence?

A. That is right.

Mr. Cutler: You may cross-examine.

Mr. Pollack: No cross-examination.

The Court: That is all.

Mr. Cutler: If your Honor please, are you going to take a recess this forenoon? If so, we would have a chance to confer with another witness here.

The Court: We will take a recess of five minutes at this time.

(Short recess.)

The Court: You may proceed.

Mr. Cutler: Your Honor please, I would like to call Mr. Deutsch to the stand for one further question. Would you come to the stand again, Mr. Deutsch? [44]

#### ANTON DEUTSCH

a witness called by the plaintiffs, having been previously sworn, resumed the stand and testified further as follows:

#### Further Direct Examination

By Mr. Cutler:

Q. Mr. Deutsch, at the time you were negotiating a sale with the Farnells, did you go over the property and have a conversation with Mrs. Stone?

A. Yes.

Q. And did she point out to and make any statement about the boundary around the carport and guest house?

Mr. Pollack: Just a moment. I think the witness has said four or five times that there was no discussion whatsoever regarding boundaries. He said further that he went out there just for the purpose of submitting an offer. He testified he was anxious to put the deal across and that he did not discuss boundaries and I think it is improper.

(Testimony of Anton Deutsch.)

The Court: Just a moment. I think that is correct. Isn't that what you testified to?

The Witness: That is approximately correct, but there was one thing that I didn't realize.

The Court: There is one thing that you forgot to tell us about?

The Witness: Yes.

The Court: What reminded you of it? [45]

The Witness: Well, actually it was brought to my attention by Mr. Farnell's attorney.

While we were negotiating there was a question about splitting the property because Mr. Farnell wanted to buy it without the guest house if it could be arranged and we were negotiating on that basis the first time and at that time she gave me a map showing where they had thought of doing it and showing how it could be cut off and she showed me on the map and also in the general way that it could be cut off by splitting it somewhere along the middle and taking the guest house off and letting the pool and the main house remain as one piece, which they were interested in, and then keeping the guest house.

Q. (By Mr. Cutler): In doing that was anything said about the boundary near the guest house?

Mr. Pollack: Just a moment. I object to that. He already told the story. Now, this is the fifth time he has told a story of eliminating any reference to the boundary. Now he is asked for the sixth time was there a conversation about the boundary.

The Court: I think that was asked a number of times, counsel.

Mr. Cutler: Any cross-examination?

Mr. Pollack: No.

The Court: That is all. Call your next [46] witness.

BRUCE D. WILFONG

called as a witness by the plaintiffs, having been first sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Bruce D. Wilfong.

Direct Examination

By Mr. Cutler:

Q. Mr. Wilfong, what is your occupation?

A. I handle the new construction and new business with the Southern California Gas Company.

Q. And were you so connected and employed in the latter part of 1953? A. Yes, sir.

Q. Were you called by the Stones to come to their property on Mulholland Drive?

A. Yes. I was contacted by a number of the people up there to make an estimate of what it would cost to run gas from Benedict Canyon up to serve this group of people there.

Q. In doing that you went right onto the property, did you? A. Yes.

Q. And did you have occasion to meet Mr. or Mrs. Stone or both of them? A. Yes.

Q. Did you meet their neighbor, Mr. Frank Peters? [47] A. Yes.

(Testimony of Bruce D. Wilfong.)

Q. What did you do in connection with giving them an estimate as to what it would cost?

A. Well, first we measured the distance required to run a main up there and then the measurements required to run services down to the meter location at the houses.

Q. And the main would have been located on Mulholland Drive? A. Yes, that is right.

Q. And then you took an estimate—

Mr. Pollack: Just a moment. Can we get the time this took place, your Honor?

The Court: 1953, wasn't it?

Mr. Pollack: More definite than that.

The Witness: Yes, I can give you some definite information on that. I was up there and signed some papers with the different people on—this was in March of 1953 and later on I released a gas service down to the house in April of 1953.

Q. (By Mr. Cutler): That was on the Stone property, was it not? A. Yes.

Q. And gas was actually connected there, you said, in April of 1953?

A. No. That is when I ran the gas service into the gas meter and the turn-on is called for whenever the customer [48] requests it but the service is in there and available when we release it to them.

Q. Now, in connection with making the estimate as to the cost for running from the main down to the house, did you and Mr. Peters—did he assist you in running the line—taking the measurements?

A. Yes. He assisted me in making the measure-

(Testimony of Bruce D. Wilfong.)

ments for the service to be installed at his house.

The Court: You mean Mr. Stone's house?

The Witness: No, Mr. Peters' house.

Q. (By Mr. Cutler): And he is a neighbor adjacent to—an adjacent neighbor to the Stone property? A. That is right.

Q. Was Mrs. Stone present when you and Mr. Peters were there doing that?

A. Well, at the time Mr. Peters and I were making this measurement we were a considerable distance apart. It is quite a ways down to his house from the property line at Mulholland Drive. I can't truthfully say since there has been quite a time elapsed since then, whether she was there or not. But as I said we were quite a distance apart, some 100 feet apart.

Q. However, do you recall that you saw her there near Mr. Peters'—

Mr. Pollack: Just a moment. The witness already said [49] he cannot truthfully say whether she was there.

Q. (By Mr. Cutler): I was asking whether or not he meant with himself or whether she was in the neighborhood.

A. Well, it is possible for him to have seen her and me not have seen her, I suppose.

The Court: You don't remember any conversation at which she was present?

The Witness: No. I have no conversation with her.

Q. (By Mr. Cutler): Did you have a conversa-

(Testimony of Bruce D. Wilfong.)

tion with Mr. Peters? A. Yes, I did.

Q. But you are not positive whether or not Mrs. Stone was there? A. No, I am not positive.

Q. You don't know whether she was present or not? A. No.

Q. Then we would like to excuse this witness and put Mr. Peters on the stand.

The Court: That is all.

Mr. Cutler: Just a moment.

Q. (By Mr. Cutler): Did you have a conversation with Mr. George Stone, Mr. Stone, as to the boundaries? A. I can't recall.

Q. Right now you don't recall talking either with Mr. or Mrs. Stone? [50]

A. Yes. I recall talking with them but whether it was exactly about the boundaries or not I don't know. I had considerable money to collect from the people for the main extension.

Q. Do you recall what you told them in regard to the distance it would be from the main to their house?

A. Yes. I have the distances right here.

Q. Did you talk it over with them and give it to them? A. (No answer.)

Q. Did you give the estimate to Mr. and Mrs. Stone?

A. There was no estimate to be made there. There are allowances set up by the gas company as to how many free feet of service we can run to a customer for the appliances that they are installing.

Since this was well under what was required or, I



(Testimony of Bruce D. Wilfong.)

am sorry, since the distance required there was less than the allowances they had there was no need to talk to him to any extent on the main extension. The deposit was made and the papers were signed and we ran the service.

I have a sketch here showing approximately how many feet it was from the property line to the heater location.

Q. And what is that distance?

Mr. Pollack: How would that be material, your Honor?

The Court: Well, I don't know. I am not sure. I thought I would listen to the evidence. It may be connected up in [51] some manner.

Mr. Pollack: Very well.

The Witness: In the case up there, since the terrain is up and down we had to take a measurement running along the top of the ground from the property line to the set-up meter location. At that time I set it at 25 feet. The crew, when they went out to install the service, installed 42 feet so that is what it was from the property line to the meter location.

Now, we went down and crossed over but that is the total length of pipe. In other words, that is the total length of pipe that we installed there.

Q. (By Mr. Cutler): In what portion of the house was the meter installed?

A. The meter was installed 10 feet back from the right front corner of the house on the right-hand side as you are facing it from the street.



(Testimony of Bruce D. Wilfong.)

Q. The total distance that you installed pipe was 42 feet?      A. Yes, sir.

Q. Did you tell the Stones where the boundary line was as you installed this or while you made the survey?

A. I think we discussed it because I have on my sketch here—I show the property line running at an angle across—through the carport. [52]

Q. Your best recollection is that you did have such a discussion with the Stones?

A. I will put it this way. I usually talk it over with a customer.

The Court: But you didn't know whether you did or not?

The Witness: No, sir, not to be positive.

Mr. Cutler: That is all. You may cross-examine.

### Cross-Examination

By Mr. Pollack:

Q. This property line that you are talking about, where did you get the information on that?

A. From our survey crew. They go up before we install a main. They go up and stake the location of the installation of the main.

Q. As I understand your testimony you don't remember telling either Mr. or Mrs. Stone anything about where the property line was, is that correct?

A. As I said, I can't remember positively whether we discussed that or not.

Mr. Pollack: That is all.

The Court: Call your next witness.

## FRANK QUEEN PETERS

called as a witness by the plaintiffs, being first sworn, was examined and testified as follows:

The Clerk: State your full name. [53]

The Witness: Frank Queen Peters.

## Direct Examination

By Mr. Cutler:

Q. Mr. Peters, you reside near the Farnell residence, do you, on Mulholland Drive?

A. Immediately to the east.

Q. Did you hear the testimony of Mr. Wilfong in regard to the preliminary survey to introduce the gas to your place?

A. I did. I beg your pardon, it wasn't introducing the gas to my place. That was to the Stones' residence. Mine was later. My house was not completed at that time.

Q. You are adjacent to the Stones' place?

A. On the road.

Q. And you were on the road there working with Mr. Wilfong? A. Yes, sir.

Q. Was your house in the road, too?

A. No, sir. That is a private road which runs from Mulholland north and down to our house on the point which is immediately, almost immediately adjacent and a little bit forward or north of the Stones' residence at that time.

Q. In doing the measurement there with Mr. Wilfong, was there any conversation between you and him as to where the boundary line of Mulholland

(Testimony of Frank Queen Peters.)

—the end of the easement was of Mulholland [54] Drive?      A. Very definitely.

The Court: Who is “Jim”?

Mr. Cutler: “Between you and him,” meaning Mr. Wilfong, the gas man?

The Witness: Yes.

The Court: Who were present?

The Witness: Mr. Wilfong and myself. It is my distinct impression that Mrs. Stone was in front of the house. I am not certain of that. I did not make any notes on it but I am sure, I feel certain that she was somewhere there in the front part of the location.

At that time I did not expect to be called as a witness. I made no definite remarks about it but I am sure she was there. She usually was around at that time of day.

Q. (By Mr. Cutler): Did Mr. Wilfong indicate where the——

The Court: Just a moment. Was Mrs. Stone where she could hear the conversation or part of it?

The Witness: I think that would call for a conclusion on my part, that she could hear. I don't know whether she could hear it or not. I know she was out in front—to the best of my recollection she was out in the front of the building.

The reason we had this measurement, your Honor, was so I would save money in bringing the gas down to my place. We had to establish the easement line which is approximately 122 [55] feet from the center. Otherwise I would have to pay so much per

(Testimony of Frank Queen Peters.)

foot for that gas line before they would start the work so Mr. Wilfong got up on Mulholland Drive and found the center marks, which he had determined, and we ran down to where I had been told the easement was. We checked it and we found that it was within about six inches or so one way or the other of where the easement began. I wanted to establish where that line was.

Q. (By Mr. Cutler): Now, as you talked to Mr. Wilfong there was quite a distance between you?

A. Yes, we were 112 or 125 feet apart. We had to yell because there is a lot of wind and noise up there, cars going by. You have to yell to be heard.

Q. And what was said at that time about the boundary?

Mr. Pollack: Just a moment. It hasn't been established satisfactorily that either Mr. or Mrs. Stone were present. The clear import of his testimony is that she was usually around there. He is not sure exactly where she was. There is no evidence as to the proximity between him and either Mr. or Mrs. Stone.

The Court: You don't know whether Mrs. Stone was present at that time or not, do you?

The Witness: No, sir. It is a little over two years ago.

The Court: You can't say? [56]

The Witness: I can't say definitely. I will not say definitely she was there. I know Mr. Stone was not there because I hadn't seen him in a long time. Mrs. Stone was usually around and I had seen her

(Testimony of Frank Queen Peters.)

that day. I know that because I found out from her about this gas company proposition and that is how Mr. Wilfong came up and measured it.

I thought we had to use butane. Mrs. Stone was kind enough to tell me the new gas line was coming in. I got in touch with Mr. Wilfong and he came up and we measured so I would know where the line was. I was very much confused because there was houses on both sides of me closer to Mulholland and yet the line was running down toward my house and I couldn't figure it out.

The Court: I don't see how this witness' testimony would be binding upon Mrs. Stone, counsel. It isn't worth very much.

Q. (By Mr. Cutler): In connection with the bringing in of the gas you did have some conversations with Mrs. Stone, did you not? A. I did.

Q. Did she say anything that would indicate that she knew——

The Court: Fix the time and place, counsel.

Q. (By Mr. Cutler): Do you remember about when that was?

A. Yes. It was some time around May because my house was [57] in process of construction. I didn't know the gas was coming in. I wanted to find out from Mrs. Stone from whom they took butane and how much it was and so forth and she kindly told me the gas was coming in there at that time.

Q. And you went over to her house and had the conversation there? A. Yes.

Q. And she was present? A. Yes.

(Testimony of Frank Queen Peters.)

Q. What was said if anything about the nearness of the line—where the main line would be?

A. As I remember she had a butane tank at the back of the carport and it was going to be taken away from there and I said, "Well, where are they going to bring in the gas?"

I wanted to know for my own reasons because I am down further and I have to pay for it. And she said, "Well, they are going to bring it into the house wherever the meter was to go."

Q. Was anything said about the distance?

A. She said "to the house."

Q. Was there any further conversation about the gas?

A. There was a little conversation about who had the deed on the road or the easement because the gas company would have to go down—Mrs. Stone was under the impression, I believe, she at least intimated as such to me, that she had [58] the easement. I then spoke to Mr. Stone the first and only time and asked him, "Well, Mr. Brush (phonetic) was in Korea," the man we bought the property from. I asked him to be kind enough to help me. I wanted to get the thing straightened out. He agreed to it but before it was necessary I had the thing back from Korea and I had my deed and at that time it was necessary to have this deed in order to determine the easement so they could bring the pipeline down my road.

Q. Was there anything said in your conversation

(Testimony of Frank Queen Peters.)

that you related with Mr. Stone or the one with Mrs. Stone, to indicate that they knew that the line ran through their residence?

Mr. Pollack: Just a moment. That would call for a conclusion of the witness.

The Court: It is leading, too. Was there anything said at that time about that pipeline and the carport?

The Witness: They told me, and you are referring—I am speaking to Mrs. Stone?

The Court: Yes, either one of them.

The Witness: No. I never spoke of anything with Mr. Stone except to explain to him that I didn't have an easement recorded as yet and it was holding up the building, so I wanted him to help me, which he kindly agreed to do, but before it was necessary I got my easement—I had the easement on the road and we couldn't find a record of anybody else [59] having it.

Mr. Wilfong came along at that time and solicited gas customers. I have a pool and we have electricity going in there. I wasn't sure I wanted gas in there if I had to pay the \$175 plus my footage, so I had a number of talks with Mr. Wilfong.

We spent quite a bit of time because that is a system up there that is a crazy setup with metes and bounds and nobody around there could give me any information and finally I got hold of the former owner and he told me my property, as of all property along there, the easement line went from where



(Testimony of Frank Queen Peters.)

the posts were and that was the easement line on both sides and that is the way it was.

And I agreed that the gas be put in and they measured and allowed me for the 122 feet before I had to start paying, plus my appliance allowance.

Q. (By Mr. Cutler): Did you have any further conversation with Mrs. Stone that you have not related?

A. No. Did you say Mrs. Stone or Mr. Stone? Mr. Stone was away.

Q. Mrs. Stone?

A. Mrs. Stone was away for a short time. You are familiar with the property there. There is quite some distance between the two properties although they are adjacent. They weren't around much. I didn't have any conversation with [60] her. The only thing that I do know is that she was there and she was probably aware of the fact I was there.

Mr. Cutler: Any cross-examination?

Mr. Pollack: No cross-examination.

The Court: That is all. Call your next witness.

Mr. Cutler: Mr. Farnell, would you take the stand?



JACK W. S. FARNELL

called as a witness on behalf of the plaintiffs, being first sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Jack W. S. Farnell.

Direct Examination

By Mr. Cutler:

Q. Mr. Farnell, you are one of the plaintiffs in this action, are you not?      A. That is correct.

Q. We want to limit your testimony especially to conversations with either Mr. or Mrs. Stone in connection with the boundaries of the property.

Now, at any time during the negotiations and prior to the actual completion of the purchase by you of this property, did you in the presence of Mrs. Stone talk about the boundaries—where they were?      A. I did.

Q. About when and where was that? [61]

A. Well, that was just prior to the consummation of the sale. I would like to go back a moment.

Q. Was there anyone else present?

A. My wife was present. I would like to go back a moment, if I may, and tell in my own words, if that is all right with you.

Q. All right.

Mr. Pollack: Your Honor, I object to it. I think the examination should be conducted by question and answer form so I may have an opportunity to object to improper questions.

(Testimony of Jack W. S. Farnell.)

The Court: I think we had better follow that line.

Q. (By Mr. Cutler): What prior occasion do you refer to, Mr. Farnell?

A. Prior to purchasing the home we were dealing with Mr. Deutsch, who was representing Chavin Realty. We asked him where the southern boundary of the property was and he agreed—

Mr. Pollack: Just a moment, your Honor. I object to any conversation had with Mr. Deutsch. There is no evidence that the defendants made any representations to Mr. Deutsch.

The Court: He was their agent, wasn't he?

Mr. Pollack: He was—I think he was an—he was employed by a brokerage firm to sell the property but that wouldn't give him the right to make representations regarding the property aside from what was in the written listing. The [62] listing has been offered and received in evidence by stipulation and unless it be shown that Deutsch had authority to talk about things outside of that listing I don't think this witness is competent to testify. I think it would be pure hearsay against the defendants.

Mr. Cutler: He certainly was the agent that negotiated the sale, made all the representations.

The Court: Counsel, you may be correct. There may be a question about it and I think we had better avoid it.

Mr. Cutler: All right.

Q. (By Mr. Cutler): At that conversation was anyone else present besides Mr. Deutsch? Was Mr. or Mrs. Stone present?

(Testimony of Jack W. S. Farnell.)

A. When I discussed the boundaries originally with Mr. Deutsch?

Q. Yes, the time you referred to just now.

A. No. That was in our home with my wife present. I asked Mr. Deutsch where the southern boundary was.

Q. Just a moment. Neither of the Stones were present?

The Court: Let us get down to when you were on the property and you were talking to Mr. and Mrs. Stone.

The Witness: My wife was present We were both talking to Mrs. Stone on the property.

Q. (By Mr. Cutler): What part of the property?

A. We were on the southern portion of the property [63] right near the back of the carport.

Q. What was said?

Mr. Pollack: May we have when this conversation took place?

The Court: About when was this?

The Witness: This was just prior to the time that we finally decided to buy the property. I can't give you the exact date but it was within five or ten days prior to the time that we decided to purchase the property.

Mr. Pollack: What month was that?

The Court: I believe we have the record here when the deal was made.

Mr. Pollack: Very well, your Honor. The deal took three months to consummate so I would like to

(Testimony of Jack W. S. Farnell.)

know with a little more particularity as to the time if he can give it.

The Court: Can you give us any better date?

The Witness: All I can say, your Honor, is that it took place prior to the time—the first time we decided to buy the property.

The Court: And you don't know when that was?

The Witness: Well, I would say it was somewhere in October.

The Court: 1953?

The Witness: Yes, 1953.

Q. (By Mr. Cutler): And would you relate what was said [64] by you and——

A. I asked Mrs. Stone where the boundary to the property was. She told me that it was south of the carport and south of the guest house.

The reason I asked that question was because they have a 6 by 6 post that is holding up one end of the carport and it seemed peculiar to have it located in that spot and if I bought the property I wanted to move it. So, I asked her where the boundary was and she told me that the reason the post was there was so all the improvements would be located on their property and that if it was moved over to the retaining wall it would be on Mulholland Drive.

Q. Was there any other conversation between you and either of the Stones with reference to the location of that particular boundary line?

A. I don't recall of any other conversation.

Mr. Cutler: You may cross-examine.

The Witness: She came out and she pointed with

(Testimony of Jack W. S. Farnell.)

her arm just exactly where the boundary went and I had no basis to question her any further other than Mr. Deutsch had also told me——

Mr. Pollack: Just a moment.

The Court: We are eliminating what he said to you. [65]

Cross-Examination

By Mr. Pollack:

Q. Mr. Farnell, who was it that indicated with their hand where the property line was?

A. Mrs. Stone.

Q. And was Mr. Stone present?

A. He was not. He was in New York. So, Mrs. Stone stated——

Q. Where were you standing when she indicated with her hand where the property line was?

A. We were standing right on where she represented the property line to be. She asked us to walk back, which we did, and she said "It runs right along here, south of the guest house and south of the carport."

Q. Did she say how far south?

A. Only to the extent that if I moved this post about five feet I would be on the city property.

Q. Did she say anything else to indicate how far south the property line was?

A. She told me that all the improvements were on the property.

Q. How did she happen to tell you that?

A. I asked the question.

(Testimony of Jack W. S. Farnell.)

Q. What question did you ask?

A. I asked her where the property line was. It was a [66] very normal question. I would do that on any piece of property that I was buying.

Q. You asked her where the property line was, is that correct? A. That is correct.

Q. And what did she say?

A. I think I have answered that, Mr. Pollack.

Q. Well, just tell me once more.

A. She told me the property line was south of the carport and south of the guest house and she pointed out with her hand the position south of both the guest house and the carport and said, "It runs along there."

Q. Did she say anything else?

A. Well, we talked about many other things, about the purchase of the property.

Q. I mean with regard to the boundary?

A. No, sir, not that I recall. She did say one other thing. She told me that the road that is east of the property was on the property we were purchasing and that she had—she told us that she had given permission to Mr. Peters to use the road. That is all she said.

Q. That is all she said?

A. That is all I can recall.

Q. Then she did not say that all the improvements were on the property? [67]

A. She made the specific statement that all the improvements were on the property.

Q. Don't you know, Mr. Farnell, when you re-

(Testimony of Jack W. S. Farnell.)

peated the story just a few seconds ago you forgot to mention that?

The Court: No, he didn't.

The Witness: I don't believe I did.

Mr. Pollack: May we have the portion read—it will take only a moment, where I asked him the question and where I said "What did she say?"

The Court: Read the last few questions and answers.

(The record was read.)

Mr. Pollack: Do you get my point?

The Court: No, I don't. The witness already testified that she said the improvements were on the property. He told you that twice.

Mr. Pollack: And then I said, "How did she happen to tell you that," and he said, "Well, I asked—I always ask—I would always ask if I were going to buy a piece of property."

The Court: He said that was a normal question to ask.

Mr. Pollack: So I said to him, "All right, now tell me what she said," and he said, "I have already told you." I said, "Well, tell me once more," and when I asked him to tell it the second time he forgot or he omitted the statement that she said the improvements were all on the property. Certainly he said it the first time but when he was asked to [68] repeat it the second time he said, "Why, I have already told you."

The Court: All right.



(Testimony of Jack W. S. Farnell.)

Mr. Pollack. Of course that should go to his credibility. There is no point in arguing that right now, but I have reason to believe he wouldn't mention it the second time he was asked.

Q. (By Mr. Pollack): And so as I understand your testimony, Mr. Farnell, you asked her where the boundary was and in response to that question she said the improvements were all on the property?

A. That is not the way I testified.

Q. Tell us the way you did testify.

A. I told you and I repeat again——

The Court: I don't want to hear it again. It has been asked and answered.

Mr. Pollack: All right.

Q. (By Mr. Pollack): Now, up until the time you came to court this morning did you ever—by the way, after you found out that part of the improvements were not on the property that you owned, you wrote some letters, did you not, to Mr. Stone? A. I wrote one letter to Mr. Stone.

Q. And that was immediately following the discovery of where the lot line was? [69]

A. No, that is not correct.

Q. What is correct?

A. Do you want me to go into a narrative of it?

Q. No, all I am asking is for the time.

A. I can't explain it properly to you unless I tell you what I did.

Q. All right.

A. Well, I went down to the City Engineer's office and I checked with a Mr. Bagley (phonetic).



(Testimony of Jack W. S. Farnell.)

He got out all the City Engineer's maps and showed me their survey. He also told me that there was a possibility that maybe these surveys were incorrect due to the fact that they had been made, as I understand it, a number of years back. So then——

Q. I am not——

A. Let me finish my answer. So I called the surveyor and I had the surveyor survey the property.

Q. I don't think I should be bound by this testimony.

The Court: This isn't hurting you any, counsel.

Mr. Pollack: Of course it isn't so far but I don't know what he is going to say and I don't want to be bound by what he says. He can talk, I don't mind that, but I don't want to be bound by anything he says because it is not responsive to my question.

The Court: There is no dispute between you as far as the fact that the improvements are not on the lot and he is telling [70] you what he did after he found out about it. You asked him whether he communicated immediately with your client.

Mr. Pollack: No, I asked him when it was with reference to the time he found out about that that he wrote a letter to my clients.

The Court: How long was that?

The Witness: It was after Jones and White made a survey of the property. I wanted to verify it.

The Court: You have answered the question.

Q. (By Mr. Pollack): Shortly after or immediately after——

A. I would say that there was an elapse in there

(Testimony of Jack W. S. Farnell.)

from the time they finished the survey of about, oh, I would say a week or three weeks from where I first had reason to believe that the improvements were not on the property.

Q. And you wrote a letter to Mr. Stone?

A. That is correct.

Q. Now, in that letter you didn't make any mention of the fact that either he or his wife had pointed out any——

The Court: Just a moment. The letter will speak for itself, counsel. If you have a letter he wrote produce it and it will speak for itself.

Mr. Pollack: Well, I will be very glad to introduce it at 2:00 o'clock, your Honor. I have to go through the file but I will be very glad to offer the letter. I just don't want to take the time now to go through the file and look for [71] it, but if your Honor prefers I will be glad to get it out very quickly.

The Court: Well, it is pretty close to 12:00 o'clock. We will take a recess at this time until 2:00 o'clock this afternoon.

(Whereupon at 12:00 o'clock noon a recess was taken until 2:00 o'clock p.m. of the same day.) [72]

Tuesday, August 9, 1955—2:00 P.M.

The Court: You may proceed. Have you finished with the witness?

Mr. Pollack: No, your Honor, I would like to have Mr. Farnell back on the stand.

JACK W. S. FARNELL

a witness called by the plaintiff, having been previously sworn, resumed the stand and testified further as follows:

Cross-Examination

(Continued)

Mr. Pollack: I will continue my cross-examination of Mr. Farnell.

Q. (By Mr. Pollack): Mr. Farnell, how much would you sell this property for as it stands now?

A. I don't—I can answer the question.

Mr. Cutler: I don't believe that is a proper question. That is improper cross-examination.

The Court: I think it probably is improper cross-examination. He hasn't testified as to values. You can call him as your own witness when the time comes.

Mr. Pollack: I am trying to—well, I will withdraw that question for the moment.

Q. (By Mr. Pollack): When Mrs. Stone said to you the line is to the south did you ask her how far to the south?

A. Well, she said it was in between this post that I [73] made reference to and the retaining wall. The retaining wall was on the city property and from

(Testimony of Jack W. S. Farnell.)

that the post from the retaining wall is a distance of about—I haven't measured it, but I think it would be about five feet.

Q. And do you remember which way she was facing when she told you that the boundary was to the south of the guest house?

A. To the best of my knowledge I think she was turned completely around. We walked out toward that and then she said, "It goes along here," and turned around and pointed behind the guest house.

Q. Did you ask her on what it was that she made that statement regarding the boundary line?

A. No.

Q. Did you ask how she knew that was where the boundary line was?

A. No. I assumed that she knew.

Q. Did you ask whether there had ever been a survey made?      A. I did not.

Q. Did she have any map with her at the time?

A. Not to the best of my recollection.

Q. Did you ever get a map from them regarding the property which would show the boundary line?

A. I had a map but I don't think you should call it a [74] map. It was a plat made by some surveying outfit and it said on it "Made for George Stone." It only calls out or draws the outline of the property. It does not include any premises on it.

Q. And do you have that copy?

A. Mr. Pollack, I am not sure that I do. I would have to go through the things we have here.

(Testimony of Jack W. S. Farnell.)

Q. Do you remember showing that map to Mr. Cutler?

A. I believe at one time I did, yes. It is not a map. I think that is an improper name for it. It is a surveyor's plat of real property just showing boundary lines with no improvements shown on it.

Q. Now, before you employed Mr. Cutler you went to see a lawyer by the name of Nichols, did you not?      A. That is correct.

Q. And isn't it a fact that when you told the facts to Mr. Nichols, you did not mention anything at all about anyone having pointed out a boundary line to you?

A. That is incorrect, Mr. Pollack.

Q. Isn't it true that it was only after you talked to Mr. Nichols that you took the position that you had been pointed out a boundary line?

A. That is incorrect.

Q. Did you ever hear prior to the time that you purchased the property that the carport encroached about two [75] feet over the property line?

A. I did not. I would not have bought the property if I had known that.

Q. Now, do you remember I came out to see you to talk to you about this case?

A. That is correct.

Q. And you took me over the property and showed me what was involved?

A. That is correct.

Q. Do you remember I asked you whether the Stones had ever attempted to point out the property lines to you?

(Testimony of Jack W. S. Farnell.)

A. I don't know whether you asked that question or not, Mr. Pollack.

Q. Do you remember you told me no, that they had not?

A. I do not remember any conversation with you, Mr. Pollack. You merely came out and stated that you were representing Mr. Stone and that you had no authority from him to attempt a settlement of any kind. You merely came out to see what the situation was and after seeing it you said, "Well, this is a question of law, the facts seem to be quite clear." I remember that extremely well.

Q. Now you know of course, do you not, Mr. Farnell, that there was a fire on that property before you bought it?

A. Mr. Stone told me there was. I did not witness it.

Q. And you know that the property was, the house, the [76] main house was rebuilt?

A. Mr. Stone told me it was.

Q. On exactly the same line on which it had been built before the fire?

A. I couldn't testify to that being accurate. Mr. Stone said that he did that. I don't know.

Q. And did you also hear that—did Mr. Stone also tell you that he spent \$25,000 repairing that house after the fire?

A. I don't think Mr. Stone ever mentioned any \$25,000 figure to me. I don't know what he spent.

Q. Now there is, of course, a likelihood that the city will vacate the land that part of the house or

(Testimony of Jack W. S. Farnell.)

the guest house and carport are now on, isn't that true?

A. The only way I can answer that, Mr. Pollack, is to say that the inquiries that I have made along that line with two members of the City Council led me, in fact they have told me that there is absolutely no possibility of doing so until the highway is actually built and the project is completed, at which time they would then sit down and consider if they would vacate the property. I don't know whether that answers your question or not.

They also stated that to the best of their knowledge the highway wouldn't be put in for another eight or nine years because of lack of funds. [77]

Q. Now, in this particular transaction Mr. Stone took back a second trust deed for approximately \$11,000, is that correct?

A. That is correct. It was slightly over \$11,000.

Q. And he has held that trust deed up to the present time?

A. I presume he has. There is a *lis pendens* action filed against it.

Q. Now, you have never felt, have you, that Mr. Stone intentionally misrepresented the boundary of the property, have you?

A. Well, you have asked me a question of opinion, Mr. Pollack, not for a fact. If you want my answer—if you want me to answer it honestly I would say yes.

Q. What is your answer?



(Testimony of Jack W. S. Farnell.)

A. I told you it would be yes, that I think that he had knowledge of it.

Q. And on what do you base that opinion that he had knowledge—that he had knowledge?

A. From the statements of the people whom we had here this morning as witnesses, who did not, in my way of thinking at any rate, when they were on this stand, change their testimony from what they have told me. I refer specifically to Mr. Peters and Mr. Wilfong.

Q. And what else besides the witnesses that you heard [78] testify today?      A. That is all.

Q. So it is your belief then based upon the stories that these people you say told you outside of court—      A. That is correct.

Q. You feel that Mr. Stone knew that the property was or the improvements were, partly on city property?

A. Based on the evidence, the stories they told me prior to this court hearing, yes.

Q. Did you take into consideration the fact that Mr. Stone had spent \$25,000 to rebuild the property on exactly the same line?

A. I don't know that Mr. Stone paid \$25,000.

Q. Well, the fact that he built that, that he rebuilt it at all on the same property line, did you take that into consideration?

A. I took that into consideration, yes. I know the property was up for sale for quite a long period of time. I think I made the best offer that Mr. Stone—that anyone made and Mr. Stone accepted it and I bought it.



(Testimony of Jack W. S. Farnell.)

Q. What has that got to do with building the fire damage to the property?

A. I don't know, Mr. Pollack.

Q. How about the fact that he took back a second trust deed for \$11,000? Do you think that a man who knows that [79] the improvements are——

The Court: That is argumentative, counsel.

Mr. Pollack: Well, I am testing the basis of his——

The Court: Nevertheless that is argumentative.

Q. (By Mr. Pollack): Now, have you ever, either by way of a letter or by way of a conversation ever said to Mr. Stone that you felt that he had intentionally misrepresented the boundary line?

Mr. Cutler: I would like to inquire if this is still on cross-examination?

Mr. Pollack: Yes.

The Court: Answer the question.

The Witness: The answer—would you repeat the question?

Mr. Pollack: Will you read the question?

(Question read.)

The Witness: I don't believe so.

Q. (By Mr. Pollack): And when I was out to you house did you tell me that you felt that he had intentionally misrepresented the boundary line?

A. To the best of my knowledge, no, because this other information came up after you were out at the house.

Mr. Pollack: I think that is all the cross-exami-

nation I have, Your Honor. I will perhaps want to examine him further on direct examination.

The Court: That is all. Call your next witness. [80]

Mr. Cutler: Mrs. Farnell, will you take the stand?

ELIZABETH P. FARNELL

called as a witness on behalf of the plaintiffs, being first sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Elizabeth P. Farnell.

Direct Examination

By Mr. Cutler:

Q. Mrs. Farnell, you are the wife of the previous witness, are you? A. Yes, I am.

Q. And one of the plaintiffs in this case?

A. Yes, sir.

Q. And you heard him testify as to the time that he fixed, about October of 1953, when he testified that you and he and Mrs. Stone were on the property looking at the southern portion of it?

A. Yes, sir.

Q. Do you recall such an instance?

A. Yes, I do.

Q. And do you recall that all three of you were present? A. Yes, I do.

Q. About where were you located on the property on that occasion?

A. Toward the south—what we thought was the south [81] boundary on the black top driveway.

(Testimony of Elizabeth P. Farnell.)

Q. Near any particular improvement—the carport or the guest house or where?

A. Near the carport.

Q. And did you hear any conversation between Mr. Farnell and Mrs. Stone?      A. Yes.

Q. Would you relate what you heard?

A. Well, my husband asked Mrs. Stone where the south boundary line was. She said it was between the post—of the south post of the carport and the retaining wall and showed us with her hand, going like this (indicating) it ran between that line and those points behind the guest house—between the guest house and the retaining wall behind it.

Q. Was there any further conversation at that time that you now recall?

A. Yes. My husband asked why the post had been placed where it was and she said it was put there so that it would be on the property, their own property and not on city property and that so all the improvements were on their own property.

Q. Was anything said about the retaining wall and as to where it was located, that you recall?

A. Not that I recall.

Mr. Cutler: That is all. You may cross-examine. [82]

Mr. Pollack: I have no questions.

The Court: That is all.

Mr. Cutler: That is the last witness we have, Your Honor. We will rest.

Mr. Pollack: I would like to make a motion at this time, Your Honor.

(Testimony of Elizabeth P. Farnell.)

The Court: Very well, make your motion.

Mr. Pollack: The plaintiffs having rested their case the defendants move that the complaint of the plaintiffs be dismissed and that judgment be rendered in favor of the defendants on plaintiffs' complaint on the ground that the plaintiffs have failed to establish the fact that the alleged statement regarding the location of the boundary was fraudulently made.

There is no evidence at all in this record showing or attempting to show that the defendants or either of them knew of the correct location of the boundary line.

There is no evidence that they acted fraudulently. The evidence is to the contrary, that they rebuilt their property after a fire; they took back a second trust deed in the sum of \$11,000.

Any slight suspicion that there could possibly be from the mere fact that they made any statement at all regarding the property line would be repealed by those facts. I believe that those facts are irrefutable as compared to a [83] possible suspicion attaching to the bare statement the property line "is to the south of the house."

There is absolutely not a single scintilla of evidence that these people acted fraudulently.

The Court: Motion denied. Call your first witness.

Mr. Pollack: Mr. Stone.

GEORGE WESLEY STONE

called as a witness by the defendants, being first sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: George Wesley Stone.

Direct Examination

By Mr. Pollack:

Q. Mr. Stone, coming directly to the time you purchased the property which you later sold to the Farnells, did you at the time have a survey made of that property? A. No, sir, I didn't.

Q. Did you at any time ever know where the south boundary line of the property was?

A. No, sir, I did not.

Q. Did you at any time tell the Farnells or anyone else where the boundary line was?

A. I can't remember ever discussing any boundary lines with anyone at any time.

Q. When you purchased the property where did you assume [84] that boundary line was, the south boundary line?

A. When I purchased the property I assumed that the line was somewhere between the edge of the macadam and the edge of my driveway. I wasn't placing too much importance on it. I just didn't think about it, I guess.

Q. At any time did you learn anything negatively—at any time did you learn negatively anything with regard to the location of that south boundary line?

(Testimony of George Wesley Stone.)

A. Not until I received the letter from Mr. Farnell telling me that he had had this survey made.

Q. While you owned the property did you have a fire on the premises? A. Yes.

Q. And how much damage was done to the house?

A. Well, the house was about 80 per cent damaged.

We received an insurance check I believe slightly in excess of \$15,100, something like that.

I kept a very accurate record of what I spent in rebuilding the house and as far as I can remember it was in excess of \$26,000.

Q. In other words, you spent \$26,000 to rebuild the house? A. That is correct.

Q. And did you rebuild it exactly on the same lines it had been built originally? [85]

A. Yes. The architect recommended definitely that we should rebuild on the same foundation and that is what we did.

Q. Now, what was the date of that fire, do you know? A. February 8.

The Court: Just a moment. What is the use of going into all of this, counsel? Let me ask a few questions here.

Mr. Pollack: Yes, Judge Harrison.

The Court: When did you buy this property?

The Witness: September 15, 1952, I believe it was 1952.

The Court: And when you bought it you as-

(Testimony of George Wesley Stone.)

sumed that all the improvements were on the property or the land that you bought, didn't you?

The Witness: I certainly did.

The Court: And that was the same land and same improvements that you sold to the Farnells?

The Witness: With the exception of some improvements, additional improvements.

The Court: I mean as far as the property was concerned. Somebody sold it to you and you assumed that all the improvements were on the land?

The Witness: That is correct.

The Court: And that is the way you sold it?

The Witness: That is correct, your Honor.

The Court: And you also treated all the improvements as [86] if they were on your land?

The Witness: I certainly did.

Q. (By Mr. Pollack): Now, at the time you sold the property to the Farnells how much was it worth?

The Court: What difference does that make, counsel?

Mr. Pollack: Well, to establish the value.

The Court: I thought you both agreed the sales price was a fair price?

Mr. Pollack: Yes, but this is just a preliminary statement that I want to compare the prices, your Honor.

Mr. Cutler: I think that has been stipulated to.

The Witness: \$25,000.

Mr. Pollack: Now——

The Court: You got \$38,000.



(Testimony of George Wesley Stone.)

The Witness: I guess I didn't understand the question.

The Court: You sold the property for \$38,000?

The Witness: That is correct.

The Court: Did you consider that a fair value of this property at that time?

The Witness: Oh, at that time I considered that that was—that I was selling it much cheaper than it was worth. I had invested much more than that in it.

Q. (By Mr. Pollack): Was the \$25,000 figure—

A. I misunderstood your question. I thought you asked me what the place was worth in view of the facts today as [87] we know them.

Q. Yes, and what was it worth?

A. I would say \$25,000.

Q. How much would you be willing to pay for the property today?

A. I haven't looked it over since I left it but if it is in as good shape as it was when I left it I wouldn't hesitate to say in excess of \$25,000.

Mr. Pollack: I think that is all, your Honor.

The Court: Any cross-examination?

Mr. Cutler: Just a word.



(Testimony of George Wesley Stone.)

Cross-Examination

By Mr. Cutler:

Q. You stated that you thought that you sold it a little cheap. You listed it originally with Mr. Chavin for \$39,500, didn't you?

A. I would like to say that originally it was listed with several other realtors.

Q. I am referring to Mr. Chavin.

A. Our first listing was \$46,000 if I remember. I couldn't tell you what the figure was that we finally told Mr. Chavin we would accept at the time he listed it. I couldn't say. I am sure that it wasn't as high as the first one.

Q. You knew that he advertised it for \$39,500, didn't [88] you?

A. I can't say that I did. I was in New York at the time.

Q. Your wife was really carrying on the negotiations here, wasn't she?           A. That is right.

Q. So you were really not conversant with the details of the negotiations?           A. Correct.

Q. Isn't it a fact that you got \$19,000 from the fire insurance company?

A. That is not a fact.

The Court: He said \$15,000, I think.

The Witness: As I remember.

The Court: What difference does that make? I don't see what difference it makes. If they had a fire they replaced it.

(Testimony of George Wesley Stone.)

Mr. Cutler: I don't think it makes any difference.

The Court: Then why waste time on it.

Mr. Cutler: I will withdraw the question and dismiss the witness as far as we are concerned.

The Court: All right.

Mr. Pollack: We have just one more witness. Could we have a short recess and that will wind up our case.

The Court: We have been going on for a half hour. I [89] guess we can stand a recess for a few moments.

(Short recess.)

The Court: You may proceed.

Mr. Pollack: Mrs. Stone, will you take the stand?

#### HILDEGARDE STONE

called as a witness on behalf of the defendants, being first sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Mrs. Hildegarde Stone.

#### Direct Examination

By Mr. Pollack:

Q. You are the wife of George Stone and you are one of the defendants in this case?

A. Yes.

Q. Now, I will call your attention to a conversa-

(Testimony of Hildegarde Stone.)

tion when you were showing the property and pointing out something with regard to the property line.

Do you remember that occasion? A. Yes.

Q. And who was it that you were with?

A. Mrs. Farnell.

Q. Was Mr. Farnell there?

A. I don't believe so, no.

Q. And do you recall whether you had anything with you at the time you were showing the area? [90]

A. Yes. I had a sketch that was given to me by the former owner.

Q. What was his name?

A. Keith Daniels (phonetic).

Q. And what did that sketch show?

A. Well, it showed two feet of the carport was encroaching on the Mulholland Drive property.

Q. And what else did it show with regard to the location of the guest house, the main house and the carport?

A. Everything was on—was within the lines except that probably two square feet of the carport.

Q. And what did you say to Mrs. Farnell on that occasion?

A. Well, I told her that according to this sketch that there were two feet of the carport was on city property.

Q. And did you tell her where you had gotten the sketch from?

A. Yes. I told her it came from Mr. Daniels, the former owner.

(Testimony of Hildegarde Stone.)

Q. Did you at any time state that the south boundary line was south of the guest house and the main house and the carport?      A. No.

Q. Did you ever state either to Mr. or Mrs. Farnell that all the improvements were on the lot?

A. No. [91]

Q. Did you ever wave your hand and say that the south boundary line was out there, pointing to a place south of the guest house and the carport?

A. No.

Q. Did you ever have any other information regarding the location of the south boundary line other than what you have told us, up until the time you sold the property?

A. No, just that sketch—just from the map from the former owner, the one he had given to us.

Q. By the way, what did you do with the map?

A. I gave it to Mrs. Farnell.

Q. It wasn't a map—it was a sketch?

A. It was a blueprint sketch or map. There was a map showing the buildings and the property.

Q. And you gave that to Mrs. Farnell?

A. Yes.

Mr. Pollack: That is all.

#### Cross-Examination

By Mr. Cutler:

Q. Mrs. Stone, did you state that you received that sketch that you referred to from the former owner?      A. That is right.

Q. Mr. Daniels?      A. Yes.

(Testimony of Hildegard Stone.)

Q. And what did it show in regard to the south boundary? [92]

A. The carport, one corner of the carport was on Mulholland Drive, on city property, about two square feet.

Q. You knew that at the time you purchased it, did you? A. Yes.

Q. And you talked that over with Mr. Daniels?

A. Yes.

Q. And did you make any protest about it?

A. Well, he said he didn't—he never thought that the city would come along but if they did and had to chop—if they had to chop that corner of the carport off it wouldn't make much difference.

Q. But where did he tell you the line actually was, the true line then? Was it within two feet of that corner of the carport?

A. Well, when he gave us this map it was evidence that that was where it was.

Q. That it was right along—

A. That these feet were encroaching on Mulholland Drive.

Q. What portion of the carport was that?

A. The south, I think the southeast corner.

Q. Was it the very corner or was it the inner corner of the carport—I mean was it the outer southeast corner of the carport or the interior corner of the carport? [93]

A. It was the corner that is closest to Mulholland Drive. I don't know the corner—it is the corner that is closest to the road.

(Testimony of Hildegarde Stone.)

Q. Closest to the road that Mr. Peters used?

A. No, to Mulholland Drive.

Q. Closest to your road in going out?

A. No, closest to the corner—let me see. Where is east and where is west? I think it is the southeast corner of the carport.

Q. And that would be the same as the southeast corner really of your lot then, wouldn't it?

A. Yes.

Q. It was the corner of the carport that fitted right into your southeast corner? A. Yes.

Q. And that showed, the map that you got, the sketch from the one you purchased from, showed that portion of the carport was over on city property?

A. Well, the one—the map that Mr. Daniels gave me showed the corner of the carport, on the southeast corner of the carport, was encroaching about two square feet on city property.

Q. And how far was it from the retaining wall?

A. I think it took in about, oh, maybe one foot of the retaining wall, the retaining wall being the back of the [94] carport.

Q. The back of the carport and it held back—

A. Yes.

Q. —the embankment there, I presume, did it not? A. Yes.

Q. Was that the only discussion you had with Mr. Daniels about the encroachment of the property onto city property? A. Yes.

(Testimony of Hildegarde Stone.)

Q. Did you ask him specifically whether or not he had had it surveyed?

A. Well, I think he presented this to us as a survey.

Q. Presented the sketch to you as a survey?

A. Yes.

Q. And did he explain why he had built beyond the survey?

A. I don't recall. Oh, I believe he claimed he hadn't built it.

Q. That he had not built it?           A. Yes.

Q. But he did have it surveyed?

A. Well, this map had been for him—I mean he had given it to me so I assumed that was true.

Q. Did that map show who it was surveyed for?

A. That I can't recall. Now, I do remember that one map was given to us and it said down in the left-hand corner [95] that it was prepared for my husband but whether that was the map or not I am not sure. But my husband had not had it prepared and it was something that he wouldn't pay for and that was after we had been in the house a week or so.

Q. Do you know who ordered that?

A. Mr. Daniels ordered it.

Q. And charged it to your husband?

A. Yes; and we never paid that bill.

Q. Do you recall the surveyor that did that?

A. No, I wouldn't know.

Q. The one who was billing you?

A. No. My husband might have that information, but I don't.

(Testimony of Hildegarde Stone.)

Q. Did you tell the Farnells that that was the south boundary line and that it cut off two feet of this carport and went around just south of the guest house there, between the guest house and the retaining wall?

A. Well, I simply told them that according to the map this corner was on city property.

Q. Well, at that time did the Farnells make any protest about it being over the line?

A. I don't think so, no.

Q. Did they say anything at all?

A. I believe they felt the same way I did when the map had been given to us. Well, it was—— [96]

Q. Now, will you just tell me what they said and not how they felt?

A. I am sorry, but I can't.

Q. You don't recall what they said?

A. Well, they certainly didn't make any objections.

Q. Do you recall?

A. Or they wouldn't have bought it, I assume.

Q. Do you recall anything said about the post, that rather large post there that was not back against the retaining wall? Did you explain why that post was set in?

A. I am afraid I don't understand.

Q. Referring to the carport. Do you recall that there is about an 8 by 8 or 6 by 6 post right at the corner of the carport?

A. You mean a steel post?

Q. No, it is a wooden post there.



(Testimony of Hildegarde Stone.)

Mr. Pollack: I have some pictures that might be helpful so you both will know what you are talking about. You might have it marked for identification.

Q. (By Mr. Cutler): I show you here a picture produced by Mr. Pollack and presented to us that shows out here at the corner, the interior corner of the carport—

A. Yes.

Q. —a beam or pillar that is set inside—it is not right out at the corner of the carport. Do you recall that [97] post being there?

A. Yes.

Q. Set in somewhat?

A. Yes.

Q. Do you recall whether or not the Farnells or either of them asked you why the post was set in that peculiar fashion?

A. Well, maybe—that is, no.

Q. Here is the corner of the carport and here is the post inside quite a ways supporting that.

A. Yes.

Q. Was there any explanation as to that discussed between you people at that time?

A. No.

Q. You don't recall any conversation regarding that?

A. No.

The Court: Have that marked for identification.

Mr. Cutler: Could we have this marked, if your Honor please?

The Clerk: Plaintiffs' Exhibit 5.

(The exhibit referred to was marked Plaintiffs' Exhibit 5 for identification.)

(Testimony of Hildegarde Stone.)

Mr. Cutler: Is there any objection to it going into evidence?

The Court: It all should be in evidence. It gives a [98] panoramic view of it.

(The exhibit referred to marked Plaintiffs' Exhibit 5, was received in evidence.)

The Court: Any further questions?

Mr. Cutler: That is all, your Honor.

Mr. Pollack: Step down. That is all.

Mr. Cutler: We would like a few moments to see if we have the sketch that Mr. Daniels gave to them.

Mr. Pollack: I have a couple of questions I want to ask Mr. Farnell as part of my case.

The Court: You may call him as an adverse witness.

#### JACK W. S. FARNELL

called as a witness by the defendants under Rule 43(b), having been previously sworn, resumed the stand and testified as follows:

#### Direct Examination

By Mr. Pollack:

Q. Mr. Farnell, how much would you be willing to sell the property for now just as it stands?

A. I don't think I can answer that question that quickly, Mr. Pollack. This thing is very involved and to ask a question like that I can't give you an honest answer.

Q. Well, you have thought about the value of the

(Testimony of Jack W. S. Farnell.)

property, haven't you, as it is today as compared to what you thought it was when you bought it? [99]

A. I hired an appraiser to determine the value of it, yes.

Q. But I want to know your idea.

A. I have no idea on that, Mr. Pollack, at the moment.

Q. I understand you to say you have no idea at all what the property is worth?

A. The property isn't salable to begin with.

Q. Well, assuming somebody would want to buy it what would you take for the property?

A. The only way I can answer you on that, Mr. Pollack, is that—to not answer your question the way you asked it, I would have to answer it by saying that we paid \$38,000 for it. We acted in good faith and as far as our relationship between us and the Stones is concerned, I think that we did not get the value as it was represented to us.

Q. I understand that but I want to know how much value you think you did get.

A. I have told you I cannot answer the question.

Q. Don't you have any idea at all what that property is worth?

A. I am not an expert, Mr. Pollack.

Q. But you own the property?

A. That is correct, I own a part of it at any rate.

Q. Would you sell it for \$15,000?

A. You mean would I sell the property for \$15,000? [100]

Q. Yes. A. And walk out?

(Testimony of Jack W. S. Farnell.)

Q. Yes.

A. If I did, Mr. Pollack, I would certainly have to have some understanding with the Bank of America to be relieved of the first and the Stones to be relieved of the second because those two today total about \$24,000, the first and second total about \$24,000.

Q. But the value of property is not determined by the amount of encumbrances. You know that, don't you?

A. I am not a realtor and I am not an appraiser.

Q. Are you willing to say one way or the other whether you would sell that property for \$15,000?

Mr. Cutler: I object to that, the witness having indicated that he could not say.

Mr. Pollack: I don't think I am bound by an answer.

The Court: I think he has answered the question. He says he doesn't know.

Q. (By Mr. Pollack): Would you sell it for \$20,000?

A. All I can say, Mr. Pollack, is I don't know. You are posing a question to me which still leaves me liable on the first and second.

Q. Well, would you sell it for \$25,000?

A. If I sold it for \$25,000 and was liable on the first and second plus the \$12,000 or so I have given to the [101] Stones you could see where that would leave me.

Q. Well, you would come out the same regard-

(Testimony of Jack W. S. Farnell.)

less of what the value of the property is. Let me pass on. Would you sell the property for \$25,000?

A. Mr. Pollack, I can't answer your question.

Q. You own the property and you have no idea what it is worth?

A. Yes, I have an idea of what it is worth from what Mr. Baehr has told me.

Q. Well, would you sell it for what Mr. Baehr said?

A. I would not sell it for that, no, because for this reason that I would not be released from the obligation to pay the first and second plus the fact that I have made certain improvements on it and I gave the Stones \$12,000.

Q. How much is the first mortgage?

A. Right today the balance of the first is about \$12,625.

Q. All right. A. And the second is \$10,926.

Q. Now, if Mr. Stone would cancel the second trust deed would you sell it for \$15,000?

A. And the buyer would take over the first?

Q. Yes—well, the bank would be paid out of the first.

A. The bank would be paid out of the \$15,000?

Q. Yes. [102]

A. No, I would not. I don't think it has any more value than that, Mr. Pollack, but I would not.

Q. We are trying to determine what the value is and one way—

The Court: Just a moment. Let me ask what do you figure your damages have been by reason of this unfortunate situation?

(Testimony of Jack W. S. Farnell.)

The Witness: Well, I made an offer to rescind.

The Court: I don't care about that. When did you make the offer?

The Witness: To be made whole. It figured out that the damages were around \$14,000 plus that which I put into the property and assuming that I am relieved of the first and the second trust deeds.

Q. (By Mr. Pollack): Let me ask you just once more. At what price would you sell that property today?

The Court: I am going to sustain the objection on my own motion. I don't think it is material.

Mr. Pollack: Very well.

The Court: Any further questions?

Mr. Pollack: No.

The Court: That is all. Any further evidence?

Mr. Pollack: No, the defense rests. Oh, pardon me, except for the other on the counterclaim, your Honor.

I think it is admitted that the payments weren't made, [103] isn't that true?

Mr. Cutler: The payments were not made? Yes. I admitted in the answer to the counterclaim that you alleged that payments have not been made except—that payments have not been kept up on the second trust deed but they have on the first.

Mr. Pollack: Yes.

Mr. Cutler: Pending this action.

Mr. Pollack: Yes. And that the second trust deed is in default except for the defenses you have alleged.

Mr. Cutler: Yes. We would like permission, if your Honor please, to submit—we do not seem to be able to find the sketch that Mrs. Stone has referred to as being prepared by Mr. Daniels and charged to Mr. Stone. But we would like to produce it and file it here as an exhibit.

Mr. Pollack: I could hardly consent to that. I certainly would want to cross-examine anyone who claims that they have the document. I would want to make sure it was the right document. I couldn't stipulate to the filing of any document at all that I know nothing about.

Mr. Cutler: However, if we could show that to you and we would like to introduce that at the present time, but unfortunately it doesn't seem to be available. Have you looked through everything here, Mr. Farnell?

Mr. Farnell: Yes, and I can't find it. [104]

Mr. Cutler: That sketch must be introduced—it must have been introduced. Could I ask Mr. Stone one question. Perhaps he can tell us who prepared the sketch.

Mr. Pollack: If he knows. I don't think he knows.

Mr. Cutler: Do you know who prepared the sketch that Mr. Daniels ordered?

Mr. Stone: All I can tell you is that a few days after I took possession of the house I received a bill from a strange firm and I refused to pay that bill. That is all I know.

Mr. Cutler: You received the sketch, too, did you?



Mr. Stone: No, I didn't. I received a bill.

Mr. Cutler: Did you receive a sketch at all yourself?

Mr. Stone: Did I see?

Mr. Cutler: Yes.

Mr. Stone: I remember seeing such a sketch, I believe, yes. I seem to remember that.

Mr. Cutler: Does Mrs. Stone remember where she got it?

Mr. Pollack: She said from Mr. Daniels.

Mr. Cutler: He gave it to you?

Mrs. Stone: Yes.

Mr. Cutler: We will attempt to find it and submit it to Mr. Pollack and perhaps on his stipulation it can be filed with the court.

Mr. Pollack: If I am satisfied that that is the one I [105] will be glad to stipulate to it, yes.

Mr. Cutler: Very good.

The Court: Now, gentlemen, pursuant to our conference in chambers, I am going to give counsel time to brief the questions of law, and I am willing to give you sufficient time to find out whether or not there is any chance of getting a clearance from the city so that everybody can be made whole.

I want to say this to both people on both sides. You both look like pretty decent, fine people to me. It looks like there has been an unfortunate mistake made here.

I think that Mr. Stone was probably sold a bill of goods and it is very apparent that the Farnells have been sold a bill of goods. I am not passing on the question of it at this time. I am simply making these



comments on the assumption that they were sold a bill of goods when they bought the property and that there has been a substantial loss here on account of it. As a matter of fairness neither one should bear the entire loss and I think these good people should be able to adjust their differences.

The evidence here indicates that the city may some time in the future require this property and they may not, but in any event at the present time it certainly is an unsalable piece of property and it would have been unsalable when the Stones sold it if the true facts had been known. [106]

As a matter of fact they wouldn't have bought it, probably, if they had known the true facts. Just because somebody passes off a counterfeit dollar bill on you doesn't justify you passing it off on somebody else.

It seems to me that as a matter of fairness and justice between people that they shouldn't have to resort to a final decision by this court. Notwithstanding the differences of opinion of the lawyers I think the law is pretty well settled under such circumstances, but it seems to me that the Farnells, having their place and having you might say their pie, and the possibilities are that they are going to be able to enjoy their property if they want to continue living there for an indefinite length of time, and eventually they may be able to make an adjustment with the city.

It seems to me rather unfair that the Stones should bear the entire loss. I think there should be

some adjustment between the parties. I think they should treat each other as they would like to be treated rather than to have the court make a cold, hard decision.

I am able to and I am not afraid to. These look like good people and they ought to be able to sit down and try to adjust their differences.

I realize that the Stones live in New York, a long distance away, and they probably want to have this a closed incident. They have an interest or an investment in this [107] property, the second trust deed, and they don't want to be coming out here and having further litigation. I don't suppose at this time of the year you enjoyed the trip across the continent unless you happened to be traveling in an air-conditioned Cadillac. But what I have understood from counsel the defendants in this case have enjoyed their home and would like to have their home and apparently have a nice, delightful spot. They would probably a great deal rather live there than they would in New York. I have been in both places this spring and I think I would rather live out on Mulholland Drive than in New York.

There has been some conflict in the testimony but I don't think it is very serious.

When you had the property surveyed you felt that you had not gotten all you thought you were getting and when you people found that out you felt that you had sold everything that you had gotten—you were selling the same thing, but there is undoubtedly a loss here that somebody is going to have to bear.

It seems to me as a matter of justice, taking the chances of what is going to happen in the future, you ought to be able to make some adjustment and I am going to give counsel an opportunity to make such an attempt.

The case will be submitted on 20, 20 and 20 and if there is any likelihood of your being able to make an adjustment [108] with the city or between themselves, between the parties, I will consider an application for the reopening of the case to take further evidence on the element of damages, but unless there is something definite, some definite arrangements made with the city I will just have to decide it. But I do hope that you people—and when I say “good people” I think you are both good people—both of you got into an unfortunate situation and both of you are going to have to bear, no matter what the outcome is, you are going to have to bear part of the loss and it seems to me there is no use of either one of you getting on your so-called high horse about it.

Just try to be fair with one another and see if you can't adjust it.

Don't you think you can among yourselves keep these lawyers out of it. These lawyers want to fight all the time. Just see if you can't make an adjustment. However, if you want the court to decide it the court will decide it. All you have to do is say the word and I will decide it and let the chips fall where they may. But I think you will be happier if you will settle it among yourselves.

I would like to see you people go out and have

dinner together tonight and see if you can't forget about it and when you feel in a good nature talk it over rather than after sitting here in the courtroom call each other names, more or [109] less indirectly.

We will submit it that way. I think it will be much finer if you people can make your own adjustment rather than have the court do it.

I practiced law for 25 years and I know what it means to get up on your high horse and fight and say "I have a right to have this and that and everything else," but when you get through we don't always get it. One of the lawyers in this case is going to be wrong—eventually is going to be held wrong in his conclusions, and I think the old adage "A poor compromise is better than a good lawsuit" still holds true.

Try to find some place to get out of the smog long enough to talk this over and thresh it out among yourselves.

I understand there has been some effort in that respect. At least I suggested that to counsel the other day, but so far as I know, no results so far have been accomplished.

I have always found that you should never quit. There is always a possibility of a settlement. There hasn't been any bitterness shown in this case. Nobody seems to be mad at each other. Even the lawyers are not very mad at each other. They get paid for being mad. As far as the individuals are concerned they seem to be pretty good natured.

I feel that all four of them would like to live and let [110] live and it seems to me that when they are

here together instead of trying to settle things 3,000 miles apart by correspondence there should be an attempt made toward a settlement.

It would be easy for me to decide but I think it would be far more satisfactory if the people would decide it among themselves.

The Clerk: There is an additional defendant in the counterclaim, your Honor.

The Court: What are you going to do with the Bank of America claim?

Mr. Pollack: Unfortunately we are back at that again. Has your Honor read the authorities I submitted?

The Court: I have made up my mind as to that, counsel. If you are not going to dismiss I will remand it to the State Court. I should have told you that this morning. I don't want to send you back there with these people 3,000 miles away.

If I had caught this weeks ago I would have remanded it to the State Court and that would mean probably three or four years before you would get to trial. When I found these people were on their way from New York it was too late to stop them.

I told you that if you would dismiss as to the Bank of America it would clear things up. They haven't even appeared. [111] They are only named as trustee. I realize they may be concerned only as a nominal party but there is no occasion for the court to take a risk on the question of jurisdiction.

So, you are going to have to make up your mind as to whether you are going to dismiss as to the

Bank of America. And you will have to make it up quickly, too.

Mr. Pollack: How quick?

The Court: About three weeks.

Mr. Pollack: That is awfully quick.

The Court: Well, it isn't too quick because I talked to you about it the other day.

Mr. Pollack: May I have just a moment to talk to my client?

The Court: The testimony here is that the payments on that trust deed are up to date. They are the trustees on the second mortgage?

Mr. Pollack: Yes. I think they are the beneficiary of the first trust deed.

The Court: I want this understanding with counsel, that in taking this under submission these people are to have an opportunity to see if there is any possibility of settling this matter. I want an understanding that there will be no further steps taken in this matter until this case is concluded.

Mr. Pollack: There is no intention of pressing that at [112] all until after this case is concluded.

The Court: I just want that definitely understood. You will have to get the California corporation out of the case.

Mr. Pollack: I will dismiss as to the Bank of America.

The Court: All right. It will be submitted, as I said, 20, 20 and 20.

Mr. Cutler: 20 days for the plaintiff?

The Court: There is only one question of law in this case, gentlemen, where you differ substantially

apparently from our discussions in chambers, and that is whether there has to be a definite intent proven on the part of the Stones. The contention on the other side is that whether they knew the boundaries are not they are presumed to know them. Now, that is the only difference and that is the only point you need to cover. It isn't going to be a difficult thing. I am giving you plenty of time to afford the attorneys an opportunity to see if they can do anything with the situation.

I understand that this property is lower than the street there.

Mr. Stone: Yes.

Mr. Farnell: Yes.

The Court: And the highway is built up above the property.

Mr. Cutler: That is correct, your Honor.

The Court: So it isn't going to hurt the highway any [113] if there is some deviation.

Mr. Pollack: Not a bit.

The Court: The only thing is a question of getting action by the city. These people are entitled to a merchantable title to that property just the same as the plaintiffs in this case are entitled to a merchantable title which they thought they had.

Mr. Pollack: Very well.

The Court: This is one of those unfortunate situations. It is too bad it has to reach court and I am stretching this out a little bit, as far as briefs are concerned, in the hope that while you people are enjoying our California smog you might be able to



think of something else and see if you can't adjust your differences.

There is such a thing as fair play and I think it is going to take fair play on both sides. You can't settle a case by one side getting everything and the other side nothing. Each one has to make concessions to clean a case up. That is just one of the things that happens in a compromise. A compromise to my way of thinking means that one party really loses something by a compromise because if he had won the case he wouldn't have had to make that concession. But how does he know who is going to win? You might have this property tied up in litigation for three or four years. Life is too short. As I said before, I think you all look like [114] good people here and you ought to be able to get along and work this out. And if you are able to enjoy the beautiful view up there your mind ought to be clear and clean and you ought to be willing to do what you think is fair to one another. Won't you try it. Otherwise I will decide it. I won't have any trouble. It is going to hurt somebody.

Mr. Cutler: Thank you, sir.

(Whereupon, at 3:30 o'clock p.m. the above-entitled matter was concluded.) [115]

#### Certificate

I, J. D. Ambrose, hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.



I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 22nd day of Jan., 1956.

/s/ J. D. AMBROSE,  
Official Reporter.

[Endorsed] Filed January 23, 1956.

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[Title of District Court and Cause.]

#### CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 77, inclusive, contain the original

Petition for Removal;

Affidavit of Giving Notice of Filing Petition for Removal;

Notice of Removal;

Statement in Opposition to Motion to Quash Summons, etc.;

Withdrawal of Motion to Quash;

Notice of Motion to Join Additional Party on Counterclaim;

Demand for Jury Trial;

Answer and Counterclaim;

State of Georgia v. Wilson to Bring in the Grand Jury.

State of a Motion to Quash Service, Affirmative & Denial & Judgment in Support Thereof.

Answer to Counterclaim.

Reconsideration of Order.

Judgment.

Findings of Fact & Conclusions of Law.

State of Entry of Judgment.

State of Appeal.

Substitution of Attorneys.

State of Substitution of Attorneys.

Decree of Court.

which together with plaintiff's exhibits, original Exhibits 1, 2, 3, 4 and 5 and 7 copies of defendant's transcript of proceedings for August 4, 1955, as the above-entitled case, constitute the transcript of record as filed in the United States Court of Appeals for the Ninth Circuit, in said case.

I further certify that my fees for preparing the foregoing record amount to \$100, which sum has been paid by applicant.

Witness my hand and the seal of said District Court, this 1st day of February, 1956.

[Seal] JAMES A. CHILDRESS,

Clerk.

By *vs.* CHARLES E. JONES,

Deputy.

[Endorsed]: No. 15024. United States Court of Appeals for the Ninth Circuit. George Wesley Stone and Hildegarde Stone, Appellants, vs. Jack W. S. Farnell and Elisabeth Pattee Farnell, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed February 3, 1956.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the  
Ninth Circuit.

United States Court of Appeals  
for the Ninth Circuit

No. 15024

GEORGE WESLEY STONE and HILDEGARDE  
STONE,

Appellants,

vs.

JACK W. S. FARNELL and ELISABETH PAT-  
TEE FARNELL,

Appellees.

STATEMENT OF POINTS ON APPEAL ON  
WHICH APPELLANTS INTEND TO RELY

The following are the points on which the appellants intend to rely on their appeal in the within proceeding:

1. The Findings of Fact are incorrect and erroneous and are not supported by the evidence.

2. The Conclusions of Law are incorrect and erroneous and are not supported by the Findings of Fact.

3. The judgment in favor of appellees and against appellants for damages in the sum of Fifteen Thousand (\$15,000.00) Dollars, and for cancellation of the promissory note and second trust deed given to secure the same, referred to in the counterclaim, is contrary to the law and the evidence.

4. Neither the evidence nor the Findings of Fact sustain paragraph I of the Conclusions of Law that

in making the sale of the real property referred to, appellants committed both constructive and actual fraud under California law.

5. Neither the evidence nor the Findings of Fact sustain paragraph II of the Conclusions of Law that appellees have a right to sue for damages.

6. Neither the evidence nor the Findings of Fact sustain paragraph III of the Conclusions of Law that appellants are not entitled to foreclose the trust deed set out in their counterclaim, and that said trust deed and the note secured thereby should be cancelled.

7. Neither the evidence nor the Findings of Fact sustain paragraph IV of the Conclusions of Law that appellees are entitled to judgment in the sum of Fifteen Thousand (\$15,000.00) Dollars, and their costs incurred or expended.

8. The evidence does not sustain the allegations of fraud, either actual or constructive, as alleged in the complaint.

9. The evidence at best shows mistake on the part of appellants; allegations of fraud cannot be sustained by proof of mistake.

10. There is no finding of scienter or knowledge on the part of appellants. A finding that a representation was false without a finding of the presence of knowledge or scienter is not sufficient to sustain the conclusion of fraud.

11. The failure of the court to find on the issue of knowledge or scienter is reversible error.

12. There is no finding as to the value of the property received by appellees. Such a finding is essential in order to determine the amount of damages, if any, sustained by appellees, and the failure to make a finding thereon is reversible error.

13. The complaint in this action is one at law to recover damages based upon certain representations alleged to have been fraudulently made by appellants. It is not an action in equity for rescission. There is no evidence of knowledge of the falsity, or of intent to deceive. The evidence shows at most that the misrepresentations, if any, were honestly and innocently made. Assuming that appellants might have been liable in an action for rescission under these circumstances, they are not liable in an action at law for damages for misrepresentations honestly and innocently made without intent to deceive.

Dated: February 6, 1956.

/s/ LEO SHAPIRO,

Attorney for Appellants.

Affidavit of service by mail attached.

[Endorsed]: Filed February 7, 1956.